TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 715

THE ATLANTIC LUMBER COMPANY, APPELLANT,

vs.

COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS

APPEAL FROM THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

FILED JANUARY 24, 1936.

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IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

Common Law

SUFFOLK COUNTY:

THE ATLANTIC LUMBER COMPANY, Appellant

vs.

COMMISSIONER OF CORPORATIONS AND TAXATION, Appellee

Appeal from Decision of the Board of Tax Appeals

Before Board of Tax Appeals

PETITION—Filed June 1, 1933

A. The taxes in controversy are Massachusetts Corporate Excise Taxes. The Appellant filed an application for abatement of these taxes with the Appellee, a copy of which is attached hereto and marked Exhibit A. This application was denied by a notice of disallowance dated May 3, 1933. A copy of this notice of disallowance is attached hereto and marked Exhibit B. The amount of the taxes in controversy is $2,512.33, which was assessed for the year 1932 based on income received in the calendar year 1931 and the balance sheet of the Appellant as at December 31, 1931. These taxes were paid on October 20, 1932.

B. The facts upon which the Appellant relies as the basis of its appeal are as follows:

[fol. 2] 1. The Appellant is a foreign corporation, organized and existing under and by virtue of the laws of the State of Delaware, engaged in the business of dealing in lumber at wholesale.

2. The Appellant was, during the years 1931 and 1932, a foreign corporation carrying on business in part in the Commonwealth of Massachusetts and its business so car-

ried on in Massachusetts was exclusively interstate commerce.

The Appellant, during the years aforesaid, maintained sales offices at Boston, Massachusetts and Buffalo, New York. The Boston Office was used as a headquarters for three salesmen, who solicited orders in Massachusetts and the other New England States, and for carrying on correspondence and other natural business activities in connection with the receipt of orders and shipments of goods for the New England States. No orders were taken for less than car load lots of lumber and these orders after being passed upon were sent either to the office at Buffalo, New York, where your Appellant's distributing yard for the New England States is located, or to a mill of some subsidiary situated outside the Commonwealth, and the lumber was shipped in car load lots direct to the customers from such points situated outside the Commonwealth. Remittances from customers in the New England States were made to the Boston Office. No samples or other merchandise were kept in this Commonwealth and no goods were delivered from any store or warehouse in Massachusetts and all goods shipped into Massachusetts were shipped in car load lots from the lumber yards of your Appellant situated outside the Commonwealth. The only tangible property of your Appellant in Massachusetts during the said years was its office furniture and salesmen's automobiles valued at less than ten thousand dollars ($10,000.00). [fol. 3] Bank accounts were maintained in Buffalo, New York; Brooklyn, New York; New York City, New York; Boston, Massachusetts; and Toronto, Canada. The corporate books and records were kept at the office in Boston, Massachusetts, and some of the directors meetings were held there.

4. That, notwithstanding a protest by your Appellant that it was not liable to taxation under Chapter 63 of the General Laws of the Commonwealth of Massachusetts, as amended, the Appellee assessed to your Appellant for the year 1932 an excise tax of $2,512.33. This tax was computed by the Appellant in the following manner:

Amount of Tax Measured by Net Income

Average value of tangible property in Mass., $8,734. Divide this by average value of all tangible property, $1,557,400.; multiply resulting fraction by $56,347.* (1/3 of $169,043*, Net Loss for Year)	=	$314.80*
Wages, salaries, etc., assignable to Mass., $92,899. Divide this by amount of all wages, salaries, etc., $209,640.; multiply resulting fraction by $56,347.* (1/3 of $169,043*, supra)	=	24,970.00*
Gross receipts assignable to Mass., $278,551. Divide this by gross receipts from all business, $2,172,110.; multiply resulting fraction by $56,347.* (1/3 of $169,043*, supra)	=	7,226.00*
Net Loss Assignable to Massachusetts		$32,510.80*
Total according to income		None

[fol. 4] Amount of Tax Measured by Corporate Excess

Loss assignable to Massachusetts, as above shown, $32,510.80. Divide this by $169,043. (entire apportionable net loss); multiply resulting fraction by $3,086,009. (used for total intangible assets and computed by adding the value of stocks in subsidiaries to the value of intangible assets other than securities). This yields $593,532., which was taken as the value of intangible assets assignable to Massachusetts. The tangible assets, $7,682., were added and $601,214 became the total accepted value of assets assignable to the State.

Cash value of the company's capital stock was fixed at $3,506,625; all assets, $4,187,748.00. Divide $601,214. by $4,187,748.; multiply resulting fraction by $3,506,625; the result is $503,429. From this the value of motor vehicles in Massachusetts of $964.00 was deducted leaving $502,465.

* Denotes figures in red ink on Original Copy.

—the "corporate excess." Five dollars per thousand upon this is $2,512.33.

Total Assessment for 1932 ..... $2,512.33.

5. That your Appellant on December 31, 1931, owned and held shares of stock in the following corporations organized under the laws of Tennessee, Louisiana and South Carolina as permanent investments:

Stocks	Book Value December 31, 1931
Vestal Lumber Co., Incorporated in Tennessee	$1,180,647.46
Clayton Timber Co., Incorporated in Louisiana	100,000.00
Consolidated Lumber Co., Incorporated in South Carolina	33,859.46*
Total	$1,246,788.00

[fol. 5] The Vestal Lumber Co. and the Consolidated Lumber Co., during the years 1931 and 1932, were engaged in the business of cutting timber and manufacturing lumber. Neither company owned any property or transacted any business in the Commonwealth of Massachusetts during 1931 and 1932. The Clayton Timber Co. owns timber lands in Louisiana and transacted no business in the Commonwealth of Massachusetts during 1931 and 1932.

6. That, nevertheless, the Appellee in determining the excise tax upon your Appellant for the year 1932, included a portion of the value of said stocks of the above named as assets employed in business within Massachusetts.

C. The contentions of law which the Appellant intends to raise are as follows:

1. The excise levied on foreign corporations by the provisions of Chapter 63 of the General Laws of Massachusetts, as amended, does not apply to foreign corporations engaged, to the extent of their activities and business carried on in Massachusetts, exclusively in interstate or foreign commerce.

---

* Denotes figures in red ink on Original Copy.

2. The Appellant, to the extent which it was carrying on business in Massachusetts in the years 1931 and 1932, was engaged exclusively in interstate commerce and was not subject to said excise.

3. The imposition of the said tax against the Appellant is in violation of the Constitution of the United States in that the Appellant is denied the rights and privileges [fol. 6] assured to it therein, and in that the said tax so assessed against the Appellant is a direct burden on interstate commerce and constitutes an unlawful regulation of interstate commerce in contravention of the Commerce Clause embodied in Section 8 of Article 1 of the Constitution of the United States.

4. The said tax so assessed against the Appellant is in violation of the Federal Constitution in that it levies a tax upon the property of the Appellant situated without the limits of the Commonwealth of Massachusetts, thereby depriving the Appellant of its property without due process of law in contravention of the 14th Amendment of the Constitution of the United States.

5. The inclusion of the securities set out in paragraph five among the assets employed in business within Massachusetts was not authorized by the statute and that if authorized by the statute would be none the less illegal and void as an attempt to reach by taxation property not within the jurisdiction of the Commonwealth of Massachusetts in violation of the 14th Amendment of the Constitution of the United States.

6. The Appellant draws in question the validity of said Chapter 63 of the General Laws, as amended, on the ground that the said statute is repugnant to the Constitution of the United States in that it levies a tax that is a direct burden on interstate commerce in contravention of the Commerce Clause embodied in Section 8 of Article 1 to the Constitution of the United States.

7. The Appellant draws in question the validity of the said Chapter 63 of the General Laws, as amended, on the [fol. 7] ground that it levies a tax against property of the Appellant situated without the limits of the Commonwealth of Massachusetts, thereby depriving the Appellant of its property without due process of law in contravention of

the 14th Amendment to the Constitution of the United States.

Wherefore the Appellant respectfully prays that this Board may hear its appeal and determine that the Appellant made an overpayment of Corporate Excise Taxes in the amount of $2,512.33 for the year 1932 and that the Appellant is entitled to reimbursement of said taxes with interest at six percent (6%) per annum from October 20, 1932 in accordance with the provisions of Section 71, Chapter 63 of the General Laws.

The Atlantic Lumber Company, by its attorney,
Robert C. McKay.

The name and address of the Attorney for the Appellant, for the purpose of service of papers in connection with this appeal, are as follows: Robert C. McKay, Esq., 80 Federal Street, Boston, Massachusetts.

[File endorsement omitted.]

[fol. 8] EXHIBIT "A" TO PETITION

Form 355 H. 1932. Revision.

THE COMMONWEALTH OF MASSACHUSETTS:

Department of Corporations and Taxation
Henry F. Long, Commissioner
Division of Corporations
237 State House, Boston

Application for Abatement of Excise

May not be made after sixty days from the date of notice of assessment.

A tax bill is a notice of assessment.

Name of Corporation, Atlantic Lumber Company,
Post Office Address, 1 State Street, Boston Massachusetts.

The above named corporation hereby makes application to the Commissioner of Corporations and Taxation for an abatement of its excise tax for the year 1932, to the extent and for the reasons set forth below:

State in detail the claims of the corporation, giving all the facts relating thereto.

Regulation 10001 provides that "The application shall set forth specifically the facts upon which the applicant relies, together with a statement of the contentions of law which the applicant desires to raise, and abatement will be granted only upon grounds so specifically set forth."
If a hearing is desired on this application, this fact should be stated.

(1) Your claimant is a corporation organized under the laws of the State of Delaware, engaged in the business of dealing in lumber at wholesale. During the years 1931 and 1932 it carried on business in part in the Commonwealth of Massachusetts, but its business so carried on in Massachusetts was exclusively interstate commerce. Form 355-F, stating in detail the nature of the business of your claimant, is on file in your office. Your claimant contends, therefore, that the total tax of $2,512.33 assessed to it for the year 1932 has been illegally assessed and should be abated.

[fol. 9] (2) On December 31, 1931 your claimant owned the following securities:

Miscellaneous Bonds and Stocks	$426,996.00
Stock of Subsidiaries	1,246,788.00
Mortgages	133,000.00

The miscellaneous bonds and stocks represents an investment of the surplus funds of your claimant which was not employed in any business within the Commonwealth.

The Stock of Subsidiaries represents the following book value of the subsidiaries on December 31, 1931:

Stocks	Book Value December 31, 1931
Vestal Lumber Co., Incorporated in Tennessee	$1,180,647.46
Clayton Timber Co., Incorporated in Louisiana	100,000.00
Consolidated Lumber Co., Incorporated in South Carolina	33,859.46*
Total	$1,246,788.00

* Denotes figures in red ink on Original Copy.

The Vestal Lumber Co. and the Consolidated Lumber Co. are engaged in the business of cutting timber and manufacturing lumber. Neither company transacted any business in the Commonwealth of Massachusetts during 1931 and 1932. The Clayton Timber Co. owns timber lands in Louisiana and transacted no business in the Commonwealth of Massachusetts during 1931 and 1932.

The mortgages of $133,000.00 represents a mortgage on lumber mill property in Arkansas City, Arkansas.

In computing the corporate excess of your claimant a portion of the book value in the above assets has been included as assets employed in business within the Commonwealth on December 31, 1931. It is contended that no part of the value of these assets should be so included.

(3) A hearing is desired on this application.

[fol. 10] EXHIBIT "B" TO PETITION

Copy

THE COMMONWEALTH OF MASSACHUSETTS:

Department of Corporations and Taxation

State House, Boston

Division of Corp's, Harold S. Lvon, Director

May 3, 1933.

Henry F. Long, Commissioner. Edward A. Doherty, Francis O. P. Carlson, Deputies.

Atlantic Lumber Company, 1 State Street, Boston, Massachusetts.

In re 1932 Excise Tax

GENTLEMEN:

After careful consideration of the application for abatement of the excise tax assessed upon the above named corporation, notice is here given that the request for an abatement of the tax in whole or in part is hereby denied.

Very truly yours, Henry F. Long, Commissioner, by G. M. Stevens (Signed.)

GMS:GMS.

[fol. 10-a] COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

SUPREME JUDICIAL COURT

I, Charles S. O'Connor, Clerk of said Court, hereby certify that the attached is a true copy of the 1932 corporation excise tax return which was attached to the Appeal of the Atlantic Lumber Company v. Commissioner of Corporations and Taxation, Docket No. 33642 Law, Supreme Judicial Court for the County of Suffolk.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, this eighth day of February in the year of our Lord one thousand nine hundred and thirty-six.

Charles S. O'Connor, Clerk. (Seal.)

[fol. 10-b] February 7, 1936.

I, Henry F. Long, Commissioner of Corporations and Taxation of The Commonwealth of Massachusetts, certify that the attached is a true copy of the 1932 corporation excise tax return filed by the Atlantic Lumber Company with me pursuant to the provisions of General Laws, Chapter 63, Section 40. The figures shown in blue pencil were not a part of the original return as filed but are notations which were made by the assessing clerk. The copy does not include accompanying schedules.

Attest.

Henry F. Long, Commissioner of Corporations and Taxation.

I, Ernest W. Ricker, hereby certify that the attached is a true copy of the 1932 Excise Tax Return which was admitted as Exhibit No. 1 at hearing on January 4, 1934, in the appeal of The Atlantic Lumber Company vs. Commissioner of Corporations and Taxation, Docket No. 2633, before Board of Tax Appeals.

Attest.

Ernest W. Ricker, Assistant Clerk. (Seal.)

(Here follow 4 photos, folios 10-c, 10-d, 10-e, 10-f)

Page 1

Form 355B
1932 Revision

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF CORPORATIONS AND TAXATION

FOREIGN / FOREIGN MANUFACTURING } CORPORATION EXCISE TAX RETURN 1932

GENERAL LAWS, CHAPTER 63, AS AMENDED.
To be filed not later than the tenth day of April, 1932
With Henry F. Long, Commissioner of Corporations and Taxation, Division of Corporations, 237 State House, Boston.

RECEIVED	ASSESSED	
L M APR 12 1932 L	2	To the treasurer of Atlantic Lumber Company, The 1 State St. Boston, Mass. 177
PENALTY	AUDITED BY Comp. Desk Field	
	Mach	
DISTRIBUTION / LOCAL ✓	DO NOT WRITE ABOVE THIS LINE	
	READ INSTRUCTION SHEET	

Statement of The Atlantic Lumber Company (Name of corporation) Delaware (State where organized) Wholesale Lumber (Kind of business, specify in detail)

Post office address One State St., Boston Mass.

Location of principal office One State Street (Street and Street Number) Boston (City or Town) Massachusetts (State)

Name of Treasurer George E. French Location of Massachusetts Office One State St., Boston (Street and Street Number) (City or Town)

Did this corporation in its Federal Income Tax Return consolidate its net income with another corporation? No

If so, give names of corporations which participated in filing such Federal Return

Return of Income for the taxable year ending December 31, 1931 193

SCHEDULE A. NET INCOME AS REPORTED IN LAST FEDERAL RETURN DUE PRIOR TO APRIL 1, 1932

Item No.	GROSS INCOME										
1.	Gross Sales from Trading or Manufacturing, $2172110.30; Less Returns and Allowances, $91693.84; Net Sales					$	2	080	416	46	
2.	Less Cost of Goods Sold:										
	(a) Inventory at beginning of year	$	1	459	685	82					
	(b) Merchandise bought for sale		1	352	494	24					
	(c) Cost of manufacturing or producing goods: Salaries and Wages, $; Other Costs, $; Total			None							
	(d) Total of lines (a), (b), and (c)	$	2	812	180	06					
	(e) Less inventory at end of year			953	313	04	1	858	867	02	
3.	Gross Profit from Trading or Manufacturing (Item 1 minus Item 2)						$		221	549	44
4.	Gross Profit from Operations Other Than Trading or Manufacturing. (State source of income):							None			

(c) Cost of manufacturing or producing goods: Salaries and Wages, $; Other Costs, $; Total			None								
(d) Total of lines (a), (b), and (c)	$	2	812	130	06						
(e) Less inventory at end of year			953	313	04	1	858	867	02		
3. Gross Profit from Trading or Manufacturing (Item 1 minus Item 2)						$	221	549	44		
4. Gross Profit from Operations Other Than Trading or Manufacturing. (State source of income):											
(a)							None				
(b)											
(c)											
5. Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds							38	025	86		
6. Rents							None				
7. Royalties							None				
8. Profit from Sale of Real Estate, Stocks, Bonds, and other Capital Assets							102	578	67		
9. Dividends on Stock of Domestic Corporations							30	093	15		
10. Other Income (including dividends received on stock of foreign corporations). (State nature of income):											
(a) Exchange								261	74		
(b) Fire Insurance collected							2	849	82		
(c) Tax Refunds - State Mass.							6	259	76		
11. TOTAL INCOME IN ITEMS 3 TO 10										$	246 461 10
DEDUCTIONS											
12. Compensation of Officers (Attach copy of Federal Schedule C)						$	62	100	00		
13. Rent on Business Property							10	782	05		
14. Repairs; Salaries and Wages, $; Other Costs, $; Total								None			
15. Interest							28	654	46		
16. Taxes							5	023	10		
17. Losses								None			
18. Bad Debts							13	141	71		
19. Dividends (Attach copy of Federal Schedule H)							30	093	15		
20. Depreciation (resulting from exhaustion, wear and tear, or obsolescence). (Attach Copy of Federal Schedule I)							11	979	13		
21. Depletion of Mines, Oil and Gas Wells, Timber, etc								None			
22. Other Deductions Not Reported Above. (Explain below, or on separate sheet):											
(a) Salaries and wages (not included in Item 2, 12, or 14 above)							147	540	17		
(b) Net Loss for 1929-1930 (Submit schedule)								None			
(c) Operating Expenses							96	973	56		
(d) Adjustments various Accounts							9	216	68		
(e)											
23. TOTAL DEDUCTIONS IN ITEMS 12 TO 22										$	415 504 31
24. NET INCOME (Item 11 minus Item 23) (LOSS IN RED)										$	169 043 21

SCHEDULE B. NET LOSS ADJUSTMENT—VERIFICATION OR CORRECTION OF SCHEDULE A

1. Net income as shown in Schedule A, Item 24, as verified or corrected (See instruction sheet)	$ 169 043 21
2. Net loss of previous year or years deducted in Schedule A	$ None
3. Total of Items 1 and 2	$ 169 043 21

10-6

DO NOT OMIT SUPPORTING SCHEDULES

1932
Page 2

READ INSTRUCTION SHEET

SCHEDULE C. CORPORATE EXCESS (AT DATE OF BALANCE SHEET SEE TABLE IV)

TABLE I — CAPITAL STOCK

	Amount Authorized	Amount Issued and Outstanding	Amount Paid in Thereon (If Installment Stock)	Number of Shares Issued	Par Value Per Share	Market Value Per Share
Common	$2,925,000.00	$1,925,000.00	-----	19,250	$100.	None
1st Pref.	1500 Shares	75,000.00	-----	1,500	None	None
2nd Pref.	None	None		None	None	None

Date of Charter _____ Date when corporation commenced business in Mass. _____

If stock is listed on Stock Exchange, give name of Exchange _____

If stock is not listed on Stock Exchange, state last four sales, giving the information called for in Table II. Do not include "wash" sales.

TABLE II — SALES OF STOCK

	Date of Sale	Number of Shares	Price per Share	Public or Private Sale?		Date of Sale	Number of Shares	Price per Share	Public or Private Sale?
Com. .					1st Pref.				
Com. .					2nd Pref.				
1st Pref.					2nd Pref.				

TABLE III — NET EARNINGS—LAST FIVE YEARS

Year Ended	Net Income (Loss in Red)	Deductions	Additions	Net Earnings (After Taxes)	Income Received from Securities	Dividends Declared: Common	First Preferred	Second Preferred
19 27	$ 245,802.73	$33,898.37	$ ----	211,904.36	$	None %	None %	None %
19 28	143,239.97	27,241.33	----	115,998.64		None %	None %	None %
19 29	258,380.24	41,519.67	11,288.56	228,149.13		%	None %	None %
19 30	36,338.56	288,162.92	26,369.59	225,454.77		%	None %	None %
19 31	269,043.27	179,513.84	30,093.15	313,463.90		None %	$2.50	None %
Total	514,718.29	570,336.13	67,751.30	1,094,970.80				
Average	$ 102,943.66	See Instruction Sheet Under Table III for Required Schedule		$ 218,994.16	$	%	%	%

TABLE IV. BALANCE SHEET AS OF December 31 1931

(Insert date—See instructions)

(AT CLOSE OF TAXABLE YEAR, IF INCOME TO BE REPORTED ON PAGE 1, OTHERWISE AS OF APRIL 1, 1932)

ASSETS	Books of Account	*Value (Actual)
1. Real Estate	121,937.14	121,937.14
2. Machinery used in conduct of the business	------	
3. Motor Vehicles	13,077.15	13,077.15
4. Tools, Equipment and Teams	3,832.55	3,832.55
5. Furniture, Fixtures and Supplies	9,578.71	9,578.71
6. Total of Items 1 to 5 (inclusive)	148,425.55	148,425.55
7. Merchandise	953,313.04	953,313.04
Other Tangibles		
8.		
9.		
10. Total of Items 7, 8 and 9	953,313.04	953,313.04
11. Notes Receivable	78,428.47	78,428.47
12. Accounts Receivable	1,067,537.52	978,009.47

DO NOT GROUP THESE ITEMS

*VALUES, IF ANY, MUST BE EXPLAINED

ANSWER EVERY ITEM

ANSWER EVERY ITEM

4. Tools, Equipment and Teams &c.		3	832	55						3	832	55				
5. Furniture, Fixtures and Supplies		9	578	71						9	578	71				
6. TOTAL OF ITEMS 1 TO 5 (inclusive)						148	425	55						148	425	55
7. Merchandise		953	313	04						953	313	04				
Other Tangibles 8.																
9.																
10. TOTAL OF ITEMS 7, 8 and 9						953	313	04						953	313	04
11. Notes Receivable		78	428	47						78	428	47				
12. Accounts Receivable	1	067	537	52						978	009	47				
13. Securities		426	996	00						426	996	00				
14. Cash		222	787	15						222	787	15				
Other Intangibles 15. Stocks-Subsidiaries	1	246	788	00						1 246	788					
16. Mortgages		133	000	00						133	000	00				
17.													3	086	009	09
18. TOTAL OF ITEMS 11 TO 17 (inclusive)					3	175	537	14					1	839	221	09
TOTAL ASSETS (Books of Account)					4	277	275	73		(Value Actual)			2	940	953	58

4,187,747.66

LIABILITIES	Books of Account				Actual			
1. Mortgages								
2. Notes Payable (Do not enter here notes secured by real estate)		590	000	00		590	000	00
3. Accounts Payable			932	11			932	11
Other Liabilities (Naming Items) 4.								
5.								
6.								
7. TOTAL (Items 1 to 6, incl.)		590	932	11		590	932	11
RESERVES (Follow Instruction Sheet) 8. Bad A/cs		64	528	05				
9. Taxes			725	00			725	00
10. Contingencies		25	000	00		591	657	11
11. Capital Stock	2	000	000	00	2	000	000	00
12. Surplus Including Profit and Loss†	1	596	090	57		889	605	34
TOTAL LIABILITIES	4	277	275	73	3	481	262	45

A. Are the books-of-account values for Items 1 to 5, inclusive, of the table of assets, based on cost less depreciation? Ans._____ If not, state the basis of said values upon a schedule attached to the return.

B. Are the books-of-account values for Items 1 to 17, inclusive, of the table of assets, without deduction for reserves of any kind? Ans._____ If reserves have been deducted, attach a memorandum stating the amount of reserves and the basis upon which the reserves were determined.

†If book surplus differs from actual surplus and profit and loss accounts submit a schedule showing a reconciliation.

*State the basis upon which actual values have been determined, explaining difference from books-of-account (Attach schedule if space below is not sufficient)

Reserves deducted Stocks Subsidiaries omitted

State any other facts that are material in determining "the fair value of the capital stock."

10-d

DO NOT OMIT SUPPORTING SCHEDULES

Attach Schedules Here

READ INSTRUCTION SHEET

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SCHEDULE C. — Continued

(ALL FIGURES IN TABLES B, C AND D AS OF DATE OF BALANCE SHEET, Table IV)

The following Schedules are required:
Page 1.—Items A 12, A 19 and A 20
Page 2.—Table III, Deductions, Additions, Table IV A and B
Page 3.—Table A1, A2 and A3
Page 4.—Items D 2, D 3, D 4, D 9, D 7 (b) or D 16 (b) and D 18

TABLE A. DETERMINATION OF ALLOCATING PERCENTAGE

			DIVIDE (a) by (b) to obtain decimal—Carry out decimal at least six places
1. (a) Average value (actual) of tangible property in Mass.	8,734.00	=	.00561
(b) Average value (actual) of all tangible property	1,557,400.00		
2. (a) Wages, salaries, etc., assignable to Mass.	92,899.00	=	.44314
(b) Total wages, salaries, etc.	209,640.00		
3. (a) Gross receipts assignable to Mass.	278,551.00	=	.12824
(b) Gross receipts from all business	2,172,110.00		
4. TOTAL OF ITEMS 1, 2 and 3—DIVIDE BY THREE		*3)	.57699
5. Allocating percentage (express in decimal)			.19233

*NOTE. — If only two of above proportions apply, substitute 2. If only one of above proportions applies, substitute 1.
DO NOT FAIL TO OBSERVE INSTRUCTIONS ON ACCOMPANYING SHEET.

SUPPORTING SCHEDULES

The following schedules, where applicable, must be made in support of Table A:

TABLE A-1: In this schedule show the method used in determining the average values for Item 1 (*a*) and (*b*), describing the assets and stating their value.

TABLE A-2: In this schedule specify the location of the premises to which wages are assignable and the amount assigned to each such place, whether within or without Mass.

TABLE A-3: In this schedule state the amount of sales and receipts assigned to each place of business, whether within or without Mass.

TABLE B. ASSETS EMPLOYED IN BUSINESS WITHIN MASSACHUSETTS (See Instruction Sheet)

Col. 1 CITY OR TOWN IN WHICH CORPORATION OWNS TANGIBLE PROPERTY	Col. 2 REAL ESTATE SEE NOTE	Col. 3 MACHINERY SEE NOTE	Col. 4 MOTOR VEHICLES SEE NOTE	Col. 5 MERCHANDISE	Col. 6 OTHER TANGIBLE PROP. SEE NOTE	Col. 7 AMOUNT OF MORTGAGE ON *Real Estate* REPORTED IN COL. 2
Boston	$	$	$ None	$	$6,718.00	$
Malden			886.		None	
Milton			78.		None	
Totals	$	$	$ 964.	$	$6,718.00	$

ANSWER EVERY ITEM

a Total of columns 2, 3, 4, 5 and 6 above	3 086 009 09	$7,682.00
b Total intangible assets (Item 18, Table IV)	$1,839,221.00	
c Item 5, Table A (Insert allocating percentage and multiply)	× .19233	593 532 13
d Intangible assets employed in Mass. (enter also in outside column)	$ 353,737.00	353,737.00
e Total of Items a and d		$361419.00 601214.13

ANSWER EVERY ITEM

Totals	$	$	$ 964.	$	$6,718.00	$

a Total of columns 2, 3, 4, 5 and 6 above	3 086 009 09	$7,682.00	
b Total intangible assets (Item 18, Table IV)	$1,839,221.00		
	× .19233		
c Item 5, Table A (Insert allocating percentage and multiply)		593 532 13	
d Intangible assets employed in Mass. (enter also in outside column)	$ 353,737.00	353,737.00	
e Total of Items *a* and *d*		$361,419.00	6 012 14. 13

NOTE. — In column 2, include works, structures, real estate, poles, underground conduits, wires and pipes owned within Massachusetts and subject to local taxation. In column 3, include *only* such machinery as is *owned* by the corporation within Massachusetts, and as is *subject to local taxation.* Other machinery owned by the corporation, if any, should be included in column 6. Include in column 4, motor vehicles of every type. Dealers in motor vehicles should not include stock in trade as this should be placed in column 5. Include in column 6, tools, equipment, furniture, fixtures, supplies, teams and any other tangible property situated in Massachusetts not reported in columns 2, 3, 4 and 5.

QUESTIONS SUPPLEMENTAL TO TABLE B

1. Does the real estate consist of buildings on leased land? Ans._____ If so, state whether or not the buildings are removable under the terms of the lease_____. 2. Is the real estate assessed to the corporation? Ans._____ If not, state to whom assessed _____. 3. Is the machinery assessed to the corporation? Ans._____. If not, state to whom assessed_____

TABLE C VALUE OF TANGIBLE PROPERTY SITUATED OUTSIDE MASSACHUSETTS

Col. 1 City or Town and State	Col. 2 Real Estate	Col. 3 Machinery	Col. 4 Motor Vehicles	Col. 5 Merchandise	Col. 6 Other Tangible Prop.
Buffalo, N.Y.	$121,937.14	$	$12,113.15	$442,759.38	$ 6,693.19
Arkansas City, Ark.				145,683.41	
Clayton, La.				272,439.11	
Cowards, S.C.				36,541.35	
Various Points in Canada				55,889.79	
Totals	$121,937.14	$	$12,113.15	$953,313.04	$ 6,693.19

TABLE D. SECURITIES HELD IN MASSACHUSETTS (Include both Taxable and Non-Taxable)

Col. 1 Amount of Bonds or No. of Shares Stock	Col. 2 Complete Description of Securities by Name and Class or Issue	Col. 3	Leave this Column Vacant
		$	
Total		$	

DO NOT OMIT SUPPORTING SCHEDULES

10-6

1932
Page 4

READ INSTRUCTION SHEET

SCHEDULE D. ALLOCATION OF INCOME

1. Net income as shown in Schedule B, Item 3		$169,043.21	
2. Interest included in Item 1, other than that described in Item 10 below	$ 86,864.72		
3. Dividends included in Item 1,	None		
4. Gains from the sale of capital assets exclusive of those described under Item 9 below. (See Instruction Sheet)	102,578.67		
5. Total of Items 2, 3 and 4		$ 15,713.95	
6. Difference between Items 5 and 1 (enter also in outside column)		$153,329.26	$153,329.26
Items 7 and 8 to be answered only by Foreign Manufacturing Corporations carrying on business solely in Massachusetts			
7. (a) Average fair cash value of machinery owned and used in manufacture in Mass. $ ____ / (b) Average value of total assets employed in Mass. $ ____ × Item 6=			$
8. Difference between Items 7 and 6 = income taxable at 2½%			$
Items 9 to 17 to be answered only by Corporations carrying on business outside Massachusetts			
9. Gains from the sale of tangible capital assets situated within Mass.		None	
10. Interest from: Mass. corporations (except Trust Companies); associations, partnerships or trusts having transferable shares and having a principal place of business in Mass.; Mass. inhabitants		1,161.14	
11. Total of Items 9 and 10 (enter also in outside column)		$1,161.14	$ 1,161.14
12. Difference between Items 11 and 6 = remainder to be allocated		154,490.40	
13. Item 5, Table A, Schedule C. (Insert Allocating Percentage and multiply) If a consolidated statement of the income of two or more corporations, attach a memorandum establishing the allocating percentage on the basis of consolidated factors and use this percentage in lieu of the percentage established in Table A.		.19233	
14. Income allocable to Mass. (Enter also in outside column)		29,713.14	29,713.14
15. Totals of Items 11 and 14			30,552.00
Item 16 to be answered only by Foreign Manufacturing Corporations			
16. (a) Average fair cash value of machinery owned and used in manufacture in Mass. $ None / (b) Average value of total assets employed in Mass. $ ____ × Item 15=			None
17. Difference between Items 16 and 15=income taxable at 2½%			None
18. (a) Total dividends paid Massachusetts inhabitants for year ending Dec. 31, 1931. $ 3,750.00	(b) 5% of same.	(See Instruction Sheet)	$ 187.50

SUPPORTING SCHEDULES

The following Schedules, where applicable, must be made in support of Schedule D, and firmly attached to page three of this Return.

SCHEDULE D 2 and 3: Submit an itemized schedule indicating the sources from which interest and dividends were received.

SCHEDULE D 4 and 9: Submit a detailed schedule of *capital* assets sold (not stock in trade), describing same and giving location of

16. (*a*) Average fair cash value of machinery owned and used in manufacture in Mass. $ None × Item 15=			None
(*b*) Average value of total assets employed in Mass. . . . . .$			
17. Difference between Items 16 and 15=income taxable at 2½%			None
18. (*a*) Total dividends paid Massachusetts inhabitants for year ending Dec. 31, 1931. . . . $3,750.00	(*b*) 5% of same.	(See Instruction Sheet)	$ 187.50

SUPPORTING SCHEDULES

The following Schedules, where applicable, must be made in support of Schedule D, and firmly attached to page three of this Return.

SCHEDULE D 2 and 3: Submit an itemized schedule indicating the sources from which interest and dividends were received.

SCHEDULE D 4 and 9: Submit a detailed schedule of *capital* assets sold (not stock in trade), describing same and giving location of such of said assets as are tangible.

SCHEDULE D 7 (*b*) or 16(*b*): Submit a schedule describing the assets and stating their value and location.

SCHEDULE D 18: See Instruction Sheet. Read Item 18 of the Instruction Sheet.

SUPPLEMENTAL STATEMENT

1. Did the corporation, during the year above reported for, own or rent premises outside Mass. for the transaction of business? Ans. Yes

2. If so, state when such premises were first rented and the location of the same Buffalo, N.Y. 1902

3. Did the corporation derive its profits principally from the ownership, sale, rental or use of real estate or tangible personal property? Ans. No 4. If so, state the amount of gross receipts assignable to Mass. $

CHANGES WITH RESPECT TO FEDERAL NET INCOME

Has the corporation received notification of any change in the amount of net income as determined by the Federal Government with respect to any previous year, return of which was required to be made under the laws of Massachusetts?* Ans. ..... If so, state in the space below the amount of net income as finally determined. *See Instruction Sheet

Year Ended	19	19	19	19	19	19	19
Amount	$	$	$	$	$	$	$

STATEMENT UNDER PENALTIES OF PERJURY

(Read Carefully Before Signing)

I, the treasurer (or *other principal officer*) of the above named company, state under the penalties of perjury that I have carefully examined the foregoing return, and from such information as I have been able to obtain, that the items of income as set forth in Schedule A are a true copy of such items as they were included in its last return of income due prior to April 1, 1932, and made to the Collector of Internal Revenue, that, as adjusted, verified or corrected by Schedule B, said items are true and accurate statements and that all other items, statements and all schedules in this return contained, including the accompanying schedules and statements, are true and accurate in each and every particular.

No part of the debts of this corporation as set forth in this return has been incurred nor has any office, warehouse or other place of business been maintained in a state other than this commonwealth for the purpose of reducing the amount of taxes to be paid by said corporation. **This statement is made under the penalties of perjury.**

Signed this 11th day of April 1932

Signature of treasurer or other principal officer Geo. E. French

Title of office, as for example "President" or "Treasurer" Treasurer

Payment on account may be made at time of filing this return.

Under Chapter 187 of the Acts of 1926 the OATH BEFORE A MAGISTRATE IS *NOT REQUIRED.*

DO NOT OMIT SUPPORTING SCHEDULES (SEE TOP OF PAGE 3)

20m-1-'32 No. 4201-2a

[fol. 11] BEFORE BOARD OF TAX APPEALS

ANSWER—Filed June 22, 1933

Now comes the Commissioner of Corporations and Taxation, appellee, and makes answer as follows:

(a)

The appellee admits that the appellant seasonably made application for abatement of an excise assessed the appellant in the amount of $2,512.33, such excise being measured entirely by corporate excess as of December 31, 1931, no portion of said tax being based upon income. The appellee admits that under date of May 3, 1932, the appellee notified the appellant that the application was denied. The appellee admits that the tax was paid in full October 20, 1932. The appellee denies each and *and* every material allegation, if any, of paragraph A of the petition not herein expressly admitted or which is in any way inconsistent with this answer.

The appellee admits that the appellant is a foreign corporation organized and existing under and by virtue of the laws of the State of Delaware and that it is engaged in the business of dealing in lumber at wholesale, but the appellee denies any imputation, if any, in the petition to the effect that dealing in lumber at wholesale constitutes the sole business of the appellant.

The appellee admits that the appellant during the years 1931 and 1932 was a foreign corporation carrying on business in The Commonwealth of Massachusetts. The appellee denies that the business so carried on in Massachusetts was exclusively interstate commerce.

The appellee admits that the appellant during the years aforesaid maintained sales offices at Boston, Massachusetts and Buffalo, New York. The appellee admits that the Boston office was used as headquarters for at least three salesmen, who solicited orders in Massachusetts and other New England states and that said office was used for carrying on correspondence and other natural business activities in [fol. 12] connection with the receipt of orders and shipments of goods for the New England states. The appellee denies any imputation, if any, in the petition that the appellant used said office at Boston solely for the purpose

above set forth. The appellee is ignorant as to whether no orders were taken for less than carload lots of lumber and as to whether these orders after being passed upon were sent either to the office at Buffalo, New York or to a mill of some subsidiary situated outside the Commonwealth and as to whether the lumber was shipped in carload lots direct to the customers from such points situated outside the Commonwealth, and leaves the appellant to prove its allegations with respect thereto insofar as material, if at all. The appellee is ignorant as to whether the appellant's distributing yard for the New England states is located at Buffalo, New York and leaves the appellant to prove its allegations with respect thereto insofar as material, if at all. The appellee admits that remittances from customers in the New England states were made to the Boston office. The appellee is ignorant as to whether no samples or other merchandise were kept in this Commonwealth and as to whether no goods were delivered from any store or warehouse in Massachusetts and as to whether all goods shipped into Massachusetts were shipped in carload lots from the lumber yards of the appellant situated outside the Commonwealth and leaves the appellant to prove its allegations with respect thereto insofar as material, if at all. The appellee is ignorant as to whether the only tangible property of the appellant in Massachusetts during the said years was its office furniture and salesmen's automobiles and as to whether the value of such property was less than $10,000 and leaves the appellant to prove its allegations with respect thereto insofar as material, if at all. The appellee is ignorant as to whether the appellant maintained bank accounts in Buffalo, New York, Brooklyn, New York, New York City and Toronto, Canada, and leaves the appellant to prove its allegations with respect thereto insofar as material, if at all. The appellee admits that the appellant maintained bank accounts in Boston, Massachusetts. The appellee admits that the corporate books [fol. 13] and records of the appellant were kept at the office in Boston, Massachusetts and that some, if not all, of the directors meetings were held there.

The appellee admits that the appellee assessed the appellant in the year 1932 an excise tax amounting to $2,512.33, all of which was based upon corporate excess employed in Massachusetts by the appellant as of De-

cember 31, 1931. The appellee says that in the computation of said excise the value of the capital stock of the appellant was found to amount to $3,506,626, that the value of its assets employed in Massachusetts was found to amount to $601,214, and that the value of all its assets was found to amount to $4,187,748. The appellee admits that in determining the amount of intangible assets employed in the Commonwealth by the appellant he followed Ruling 2505 of the Rules and Regulations issued by the appellee pursuant to Section 47 of Chapter 63 of the General Laws and that pursuant to said ruling he found 19.233% of intangibles found to have a value of $3,086,009.09 to be so employed in Massachusetts which amounted to $593,532.13. This sum added to the sum of $7,682 which was found to be the value of the tangible assets employed in Massachusetts constituted the above sum of $601,214, found to be the value of the assets employed in Massachusetts. The appellee in the computation of said assessment further found that the appellant was entitled to a deduction on account of motor vehicles amounting to $964. He accordingly determined the value of the corporate excess employed in Massachusetts to amount to $502,465, which at $5.00 per $1,000 produces a tax of $2,512.33. The appellee denies each and every material allegation, if any, in paragraph 4 of the statement of facts upon which the appellant relies as set out in the petition which is not herein expressly admitted or which is in any way inconsistent with this answer.

The appellee admits that the appellant on December 31, 1931 owned and held shares of stock in the Vestal Lumber Co., the Clayton Lumber Co. and the Consolidated Lumber Co. as set forth in paragraph 5 of the statement of facts [fol. 14] upon which the appellant relies in the petition. The appellee is ignorant as to whether said shares of stock were held as permanent investments and as to whether the book values as of December 31, 1931 were as alleged in the petition and leaves the appellant to prove its allegations with respect thereto insofar as material, if at all. The appellee is ignorant as to whether the Vestal Lumber Co. and the Consolidated Lumber Co. during the years 1931 and 1932 were engaged in the business of cutting timber and manufacturing lumber and leaves the appellant to prove its allegations with respect thereto insofar as material,

if at all. The appellee is ignorant as to whether neither company owned any property or transacted any business in the Commonwealth of Massachusetts during 1931 and 1932 and leaves the appellant to prove its allegations with respect thereto insofar as material, if at all. The appellee is ignorant as to whether the Clayton Lumber Co. owns timber lands in Louisiana and as to whether it transacted no business in the Commonwealth of Massachusetts during 1931 and 1932 and leaves the appellant to prove its allegations with respect thereto insofar as material, if at all.

The appellee admits that the appellee in determining the excise tax of the appellant here in question, as before in this answer stated, followed the provisions of Ruling 2505 hereinbefore referred to. The appellee denies each and every material allegation, if any, of paragraph 6 of the statement of facts upon which the appellant relies as set out in the petition not herein expressly admitted or which is in any way inconsistent with this answer.

The appellee says that paragraph 1 of the statement of the contentions of law contains no allegation of fact. The appellee denies that the appellant during the years 1931 and 1932 was engaged exclusively in interstate commerce to the extent that it was carrying on business in Massachusetts and further denies that the appellant was not subject to the excise assessed.

The appellee denies that the imposition of said tax is in violation of the Constitution of the United States for the [fol. 15] reason that the appellant is denied the rights and privileges assured to it therein or for the reason that the said tax assessed against the appellant is a direct burden on interstate commerce or for the reason that it constitutes an unlawful regulation of interstate commerce in contravention of the commerce clause embodied in Section 8 of Article I of the Constitution of the United States, or for any other reason whatsoever.

The appellee denies that the tax assessed against the appellant is in violation of the Federal Constitution for any of the reasons set forth in paragraph 4 of the contentions of law stated in the petition and further denies that the excise is a tax upon the property of the appellant either within or without the limits of the Commonwealth of Massachusetts. The appellee further denies that the tax deprived the appellant of its property without due process

of law in contravention of the fourteenth amendment to the Constitution of the United States.

The appellee denies that there was included in the assets employed in business within the Commonwealth more than a fractional part of the value of the securities and further denies that insofar as the value of the securities was included among said assets so employed there was any violation of the authority granted by the statute. The appellee further denies that the inclusion authorized by the statute was illegal and void for the reasons set forth in paragraph 5 of the contentions of law stated in the petition.

The appellee denies that Chapter 63 of the General Laws, as amended, is repugnant to the Constitution of the United States in that it levies a tax that is a direct burden on interstate commerce in contravention of the commerce clause embodied in Section 8 of Article I of the Constitution of the United States.

The appellee denies that said Chapter 63 of the General Laws is invalid on the ground that it levies a tax against [fol. 16] property of the appellant situated without the limits of the Commonwealth of Massachusetts thereby depriving the appellant of its property without due process of law in contravention of the fourteenth amendment to the Constitution of the United States. The appellee further answering says that said Chapter 63 of the General Laws in no way levies a tax that is a direct burden on interstate commerce in contravention of the commerce clause embodied in Section 8 of Article I of the Constitution of the United States and the appellee further says that said Chapter 63 of the General Laws does not levy a tax against property situated without the limits of the Commonwealth of Massachusetts and does not deprive the appellant of its property without due process of law in contravention of the fourteenth amendment to the Constitution of the United States.

(b)

The appellee relies on the facts as set forth under (a) and (c) of this answer as well as those set forth under (b) of this answer. The appellee further relies upon any facts which may be adduced at any hearing of this appeal. The appellee says that the value of the capital stock of the ap-

pellant was at least as great as determined by him for the purpose of the original assessment, that by reason of the failure of the appellant to complete its tax return he cannot now determine whether the value as so determined is less than the true value and accordingly the appellee reserves the right if such fact shall later appear to so contend. The appellee says that the principal place of business of the appellant is in Massachusetts; that the appellant there maintains its executive and managerial office; that the officers of the appellant are chiefly connected with such Massachusetts office and from that office supervise and direct all business and financial affairs of the appellant; that the appellant engages in business which is not interstate in its character as well as business of an interstate character; all of which business, both interstate and non-interstate, is supervised and directed and subject to the con- [fol. 17] trol of the officers and directing management at the Boston office. The appellee says that a portion of the business of the appellant is that of holding the securities of and directing the affairs of subsidiary corporations, all of which business is done by officers and others at the Massachusetts place of business. The appellee further says that a very substantial part of the assets of the appellant consists of securities and investments and that the business of holding, buying, selling and receiving and disbursing in dividends the income from these securities and investments is carried on at the Massachusetts place of business of the appellant. The appellee further says that the appellant carries on a large local business in New York all of which is subject to the supervision, direction and control of the officers and management in the principal place of business in Boston, Massachusetts. The appellee further says that the wages assignable to Massachusetts and the receipts assignable to Massachusetts in accordance with the provisions of Chapter 63 of the General Laws of this Commonwealth were erroneously stated in the tax return of the appellant and that the true amount of the wages and of the receipts assignable to Massachusetts is greater than as stated in said tax return; that a much larger percentage of business is carried on in Massachusetts than is indicated by said return and a much larger amount of intangible assets is employed in Massachusetts than is stated to be so employed in the tax return or than was determined by the appellee, tenta-

tively relying upon said return, to be so employed in making the original assessment; and that the business situs of the major portion, if not at all, of the intangible assets of the appellant is in Massachusetts; and that the corporate excess employed by the appellant in Massachusetts greatly exceeds the amount heretofore assessed. Wherefore, the appellee says that not only is the appellant not aggrieved by the assessment made by the appellee, but that the appellant is subject to an additional tax assessable as provided in Chapter 63 of the General Laws of this Commonwealth.

[fol. 18]

(c)

For purposes of original assessment and tentatively relying upon the tax return of the appellant, the appellee found that the value of the capital stock as of December 31, 1931 amounted to $3,506,626. He found the value of the assets employed in Massachusetts amounted to $601,214, all as more fully hereinbefore set forth under (a) of this answer. The appellee found the value of the total assets to amount to $4,187,748. He found that the appellant was entitled to a deduction on account of motor vehicles amounting to $964. He accordingly found the value of the corporate excess employed in this Commonwealth to amount to $502,465 and that the tax thereon amounted to $2,512.33, all as more particularly hereinbefore set forth. The appellee now finds that the full amount of the tax imposed by Chapter 63 of the General Laws of this Commonwealth was not assessed and that the appellant is subject to an additional tax, all as more particularly hereinbefore set forth.

(d)

The appellant made no request for any ruling of law and accordingly the appellee made no ruling of law.

(e)

The usual place of business of the appellee is Room 239, State House, Boston, Massachusetts.

Henry F. Long, Commissioner of Corporations and Taxation, Appellee.

[File endorsement omitted.]

[fol. 19] BEFORE BOARD OF TAX APPEALS

REQUEST FOR RULINGS OF LAW—Filed Jan. 18, 1934

Now comes the Appellant, by its attorney, Robert C. McKay, and respectfully moves this honorable Board to adopt the following as its rulings of law in the above entitled cause:

1. The excise levied on foreign corporations by the provisions of Chapter 63 of the General Laws of Massachusetts, as amended, does not apply to foreign corporations engaged, to the extent of their activities and business carried on in Massachusetts, exclusively in interstate or foreign commerce.

2. The Appellant to the extent which it was carrying on business in Massachusetts in the years 1931 and 1932 was engaged exclusively in interstate commerce and was not subject to the excise imposed by Chapter 63 of the General Laws.

3. A foreign corporation engaged in the business of dealing in lumber at wholesale which maintains no stock of lumber in Massachusetts and whose orders are filled by shipment direct to the customer in car load lots from stocks situated outside Massachusetts, is engaged exclusively in interstate commerce within the Commonwealth and is not subject to the excise imposed by Chapter 63.

4. A foreign corporation engaged in the business of dealing in lumber at wholesale which maintains an office in Massachusetts as the headquarters for three salesmen but which maintains no stock of lumber in Massachusetts and whose orders are filled by shipment direct to the customer in car load lots from stocks situated outside Massachusetts, is engaged exclusively in interstate commerce within the Commonwealth and is not subject to the excise imposed by Chapter 63.

5. A foreign corporation engaged in the business of dealing in lumber at wholesale which keeps its books of account [fol. 20] within the Commonwealth but which maintains no stock of lumber in Massachusetts and whose orders are filled by shipment direct to the customer in car load lots from stocks situated outside Massachusetts, is engaged ex-

clusively in interstate commerce within the Commonwealth and is not subject to the excise imposed by Chapter 63.

6. A foreign corporation engaged in the business of dealing in lumber at wholesale which owns salesmen's automobiles and office furniture situated within the Commonwealth but which maintains no stock of lumber in Massachusetts and whose orders are filled by shipment direct to the customer in car load lots from stocks situated outside Massachusetts, is engaged exclusively in interstate commerce within the Commonwealth, and is not subject to the excise imposed by Chapter 63.

7. A foreign corporation engaged in the business of dealing in lumber at wholesale which maintains one of its several bank accounts within the Commonwealth but which maintains no stock of lumber in Massachusetts and whose orders are filled by shipment direct to the customer in car load lots from stocks situated outside Massachusetts, is engaged exclusively in interstate commerce within the Commonwealth and is not subject to the excise imposed by Chapter 63.

8. A foreign corporation engaged in the business of dealing in lumber at wholesale which holds some of its directors meetings within the Commonwealth but which maintains no stock of lumber in Massachusetts and whose orders are filled by shipment direct to the customer in car load lots from stocks situated outside Massachusetts, is engaged exclusively in interstate commerce within the Commonwealth and is not subject to the excise imposed by Chapter 63.

9. A foreign corporation engaged in the business of dealing in lumber at wholesale which pays one dividend on its [fol. 21] preferred stock by check on a bank account kept within the Commonwealth but which maintains no stock of lumber in Massachusetts and whose orders are filled by shipment direct to the customer in car load lots from stocks situated outside Massachusetts, is engaged exclusively in interstate commerce within the Commonwealth and is not subject to the excise imposed by Chapter 63.

10. The imposition of the excise tax under Chapter 63 of the General Laws on a foreign corporation engaged in the business of dealing in lumber at wholesale which maintains an office in Massachusetts, keeps its books of account in Massachusetts, owns no other tangible property or real

estate in Massachusetts except salesmen's automobiles and office furniture, maintains one of its several bank accounts in Massachusetts, holds some of its directors meetings in Massachusetts and during the year pays one dividend on its preferred stock by check drawn on a bank account in Massachusetts, but which maintains no stock of lumber within the Commonwealth and whose orders are filled by shipment direct to the customer in car load lots from stocks situated outside the Commonwealth, is unconstitutional, in that said tax is a direct burden on interstate commerce in contravention of the Commerce Clause embodied in Section 8 of Article I of the Constitution of the United States.

11. The imposition of the excise tax under Chapter 63 of the General Laws on a foreign corporation engaged in the business of dealing in lumber at wholesale which maintains an office in Massachusetts, keeps its books of account in Massachusetts, owns no other tangible property or real estate in Massachusetts except salesmen's automobiles and office furniture, maintains one of its several bank accounts in Massachusetts, holds some of its directors meetings in Massachusetts and during the year pays one dividend on its preferred stock by check drawn on a bank account in Massachusetts, but which maintains no stock of lumber within the Commonwealth and whose orders are filled by [fol. 22] shipment direct to the customer in car load lots from stocks situated outside the Commonwealth, is unconstitutional, in that it levies a tax upon the property of the said corporation situated without the limits of the Commonwealth of Massachusetts thereby depriving the Appellant of its property without due process of law in contravention of the 14th amendment to the Constitution of the United States.

12. No part of the value of the stock of wholly owned subsidiaries of a foreign corporation doing business in Massachusetts are assets employed in any business within the Commonwealth within the meaning of Chapter 63, Section 4 where such subsidiaries are also foreign corporations and own no property and do no business in Massachusetts.

13. The imposition of an excise tax under Chapter 63 on any part of the value of the stock of wholly owned subsidiaries of a foreign corporation doing business in Massachusetts where such subsidiaries are also foreign corpora-

tions and own no property and do no business in Massachusetts, is illegal and void as an attempt to reach by taxation property which is not within the jurisdiction of the Commonwealth of Massachusetts in violation of the 14th amendment to the Constitution of the United States.

Respectfully submitted, Robert C. McKay, Attorney for Appellant.

[File endorsement omitted.]

[fol. 23] BEFORE BOARD OF TAX APPEALS

PROPOSED FINDINGS OF FACT—Filed Jan. 18, 1934

Now comes the Appellant, by its attorney, Robert C. McKay, and respectfully moves this honorable Board to adopt the following as its findings of fact in the above entitled cause:

1. The Appellant is a foreign corporation, organized and existing under and by virtue of the laws of the State of Delaware, engaged in the business of dealing in lumber at wholesale.

2. The Appellant was, during the years 1931 and 1932, a foreign corporation carrying on business in part in the Commonwealth of Massachusetts and its business so carried on in Massachusetts was exclusively interstate commerce.

3. The Appellant, during the years aforesaid, maintained sales offices at Boston, Massachusetts and Buffalo, New York. The Boston Office was used as a headquarters for three salesmen, who solicited orders in Massachusetts and the other New England States, and for carrying on correspondence and other natural business activities in connection with the receipt of orders and shipments of goods for the New England States. No orders were taken for less than car load lots of lumber and these orders after being passed upon were sent either to the office at Buffalo, New York, where the Appellant's distributing yard for the New England States is located, or to a mill of some subsidiary situated outside the Commonwealth, and the lumber was shipped in car load lots direct to the customers from such

points situated outside the Commonwealth. Remittances from customers in the New England States were made to the Boston Office. No samples or other merchandise were kept in the Commonwealth and no goods were delivered from any store or warehouse in Massachusetts and all goods shipped into Massachusetts were shipped in car load lots from the lumber yards of the Appellant situated outside the Commonwealth. The only tangible property of the Appellant in Massachusetts during the said years was its office [fol. 24] furniture and salesmen's automobiles valued at seven thousand six hundred and eighty-two dollars ($7,682.00). Bank accounts were maintained in Buffalo, New York; Brooklyn, New York; New York City, New York; Boston, Massachusetts; and Toronto, Canada. The corporate books and records were kept at the office in Boston, Massachusetts, and some of the directors meetings were held there.

4. The Appellant on December 31, 1931 owned and held shares of stock in the following corporations organized under the laws of Tennessee, Louisiana and South Carolina:

Stocks	Book-value December 31, 1931
Vestal Lumber Co., Incorporated in Tennessee	$1,180,647.46
Clayton Timber Co., Incorporated in Louisiana	100,000.00
Consolidated Lumber Co., Incorporated in South Carolina	33,859.46*
Total	$1,246,788.00

The Vestal Lumber Company was engaged in the business of cutting timber and manufacturing lumber in Knoxville, Tennessee; Duff, Tennessee; Arkansas City, Arkansas; Sardis, Georgia; and Clayton, Louisiana. It did no business and owned no property in Massachusetts in 1931 or 1932. The total capital stock consisted of one thousand (1000) shares of which nine hundred and ninety-one (991) shares were owned by the Appellant.

The Consolidated Lumber Company was engaged in the business of cutting timber and manufacturing lumber in

* Denotes figures in red ink on Original Copy.

Coward, South Carolina. It owned no property and trans- [fol. 25] acted no business in Massachusetts in 1931 or 1932. All of the capital stock of this corporation was owned by the Appellant.

The Clayton Timber Company held title to timber lands in Clayton, Louisiana and adjacent territory. It owned no property and did no business in Massachusetts in the years 1931 and 1932. All the capital stock of this corporation was owned by the Appellant.

5. The Appellant seasonably filed the return required under Chapter 63 of the General Laws covering its income for the year 1931 accompanied by a protest that it was not liable to the excise tax under said Chapter. On the basis of this return the Appellee assessed an excise tax of $2,512.33 to the Appellant which was computed in the following manner:

Amount of Tax Measured by Net Income

Average value of intangible property in Mass., $8,734. Divide this by average value of all tangible property, $1,557,400; multiply resulting fraction by $56,347.* (⅓ of $169,043.*, Net Loss for Year)	=	$ 314.80*
Wages, salaries, etc., assignable to Mass., $92,899. Divide this by amount of all wages, salaries, etc., $209,640; multiply resulting fraction by $56,347.* (⅓ of $169,043.*, supra)	=	24,970.00*
Gross receipts assignable to Mass., $278,551. Divide this by gross receipts from all business, $2,172,110.; multiply resulting fraction by $56,347.* (⅓ of $169,043.*, supra)	=	7,226.00*
Net Loss Assignable to Massachusetts		$32,510.80
Total according to income		None*

[fol. 26] Amount of Tax Measured by Corporate Excess

Loss assignable to Massachusetts, as above shown, $32,510.80. Divide this by $169,043., (entire apportionable net loss); multiply resulting fraction by $3,086,009, (used for

* Denotes figures in red ink on Original Copy.

total intangible assets and computed by adding the value of stocks in subsidiaries to the value of intangible assets other than securities.) This yields $593,532., which was taken as the value of intangible assets assignable to Massachusetts. The tangible assets, $7,682. were added and $601,214 became the total accepted value of assets assignable to the State.

Cash value of the company's capital stock was fixed at $3,506,625.; all assets, $4,187,748.00. Divide $601,214. by $4,187,748; multiply resulting fraction by $3,506,625.; the result is $503,429. From this the value of motor vehicles in Massachusetts of $964.00 was deducted leaving $502,465. —the "corporate excess." Five dollars per thousand upon this is $2,512.33.

Total Assessment for 1932 ..... $2,512.33

The Appellant seasonably filed a claim for abatement of this tax and paid the tax as assessed on October 20th, 1932. The application for abatement was denied in a notice of disallowance dated May 3rd, 1933.

6. In computing the aforesaid excise tax the Appellee included the value of the three subsidiaries of the Appellant as intangible assets and apportioned 19.233% of their value as assets employed in business in Massachusetts.

Respectfully submitted, Robert C. McKay, Attorney for Appellant.

Dated January 15, 1934.

[File endorsement omitted.]

[fol. 27] BEFORE BOARD OF TAX APPEALS

Docket No. 2633

THE ATLANTIC LUMBER COMPANY

vs.

COMMISSIONER OF CORPORATIONS AND TAXATION

Promulgated May 21, 1934

A foreign corporation whose business was dealing in lumber at wholesale had its principal office and one of its two

sales offices in Boston. Orders from customers in New England were accepted there and remittances from them were received there. Its most active bank account was in Boston, from which its salesmen for New England and such dividends as had been declared were paid. The corporate books and records and securities were kept in Boston. The office of the treasurer was there and directors' meetings were held there. It was held that the corporation was not engaged exclusively in interstate commerce but did some local business in Massachusetts, and hence was subject to the excise imposed by G. L. c. 63, §§ 39-43.

The corporation owned substantially all the capital stocks of subsidiaries, from which it purchased lumber for shipment to its customers. They did no business and owned no property in Massachusetts. It was held that the stocks were not assets employed in business within the Commonwealth, and that no part of their value should be included, in the determination of the corporate excess employed within the Commonwealth by the corporation.

Appeal from a decision of the commissioner refusing to abate an excise tax for the year 1932 assessed to the appellant as a foreign corporation.

The issues are, first, whether the appellant is engaged exclusively in interstate commerce and so not subject to the excise imposed by G. L. c. 63, §§ 39-43, and, secondly, if it is subject to that excise, whether the commissioner erred in determining the corporate excess employed within the Commonwealth by the appellant.

Robert C. McKay, for the appellant.
Henry F. Long, Commissioner, appellee, pro se.

Findings of Fact

The appellant is a foreign corporation, organized under the laws of Delaware. Its principal office is in Boston and it maintains sales offices in Boston and in Buffalo, New York. Its business is dealing in lumber at wholesale. It duly filed an excise tax return for the year 1932. The commissioner found that the appellant had no net income [fol. 28] derived from business carried on within the Commonwealth and determined the corporate excess employed within the Commonwealth to be $502,465. Accordingly he assessed to the appellant an excise in the amount of

$2,512.33, which was paid on October 20, 1932. The appellant seasonably applied for an abatement, claiming that the tax was illegally assessed because its business in Massachusetts was exclusively interstate commerce, and that in computing the appellant's corporate excess employed within the Commonwealth the commissioner had wrongly included a portion of the value of certain securities owned by the appellant in its assets employed in business within the Commonwealth. The application was denied and notice of the commissioner's decision was given on May 3, 1933. The appellant then appealed to this board.

The appellant's Boston office is used as the headquarters for salesmen who solicit orders in Massachusetts and other New England States and in a part of New York State, and for carrying on correspondence and other business activities in connection with the receipt of orders and shipment of goods for that territory. Orders obtained by the salesmen from Boston are accepted at the Boston office and are filled from the appellant's distributing yard at Buffalo, New York, or from the mill of some subsidiary outside Massachusetts. Lumber is shipped directly from those points, always in carload lots, to the customer. Remittances from customers in the New England States are made to the Boston office. No stocks of lumber are kept in Massachusetts. The only tangible property in this State is office furniture and equipment and salesmen's automobiles. The appellant maintains bank accounts in Boston, New York City, Buffalo, Brooklyn and Toronto, Canada, the Boston account being the most active and next to the largest in size. The Boston salesmen are paid from that account. The corporate books and records are kept in Boston, its treasurer is located there, and directors' meetings are held there. Dividends declared on the preferred stock of the appellant have been paid out of the Boston bank account, including two in 1931. No dividends have been paid on the common stock.

[fol. 29] The appellant owns all the stock, except a few shares, of three subsidiaries, the Vestal Lumber & Manufacturing Company, the Consolidated Lumber Company and the Clayton Timber Company. The business of the Vestal and Consolidated companies is the cutting of timber and manufacture of lumber, the former operating in Tennessee, Georgia, Arkansas and Louisiana and the latter in South Carolina. The Clayton company holds title to tim-

ber lands in Louisiana. It manufactures no lumber and does no other business. None of the companies has ever done any business in Massachusetts. The appellant furnishes funds to the subsidiaries when required and they are largely indebted to it. All lumber of the subsidiaries is purchased from them by the appellant, except a small amount sold locally in Tennessee by the Vestal Company, and the purchase price is credited to them. The books of the Clayton and Consolidated companies and the appellant's certificates of stock in the three companies are kept in Boston. The books of the Consolidated company were moved to Boston from South Carolina in June, 1931, and since that time the company has been almost inactive.

The appellant in its return reported the value of the shares of stock of its subsidiaries, at their book values, to be $1,246,788, the value of its other intangibles to be $1,839,221, and the value of its tangible assets employed in business within Massachusetts to be $7,682. The commissioner found that the fair value of the appellant's capital stock was $3,506,626 and that the value of the total assets was $4,187,748. He found that the value of all intangible assets was $3,086,009, including the stocks of subsidiaries, and that the value of tangible assets employed in business in Massachusetts was $7,682. In determining the value of the intangible assets employed in business within Massachusetts the commissioner followed Ruling 2505 of his Rules and Regulations, which provides: "Ordinarily, such proportion of an intangible asset employed in business will be deemed to be employed in business within Massachusetts as that portion of the remainder of income allocable to Massachusetts under the provisions of section 41 of the law bears to the total of said remainder." The proportion so determined under section 41 was .19233. Applying this proportion to the total value of intangible assets, $3,086,009, the commissioner found the value of intangible assets employed in business within Massachusetts to be $593,532. Adding the value of the tangible assets so employed, $7,682, he found the value of the assets, both real and personal, employed in business within the Commonwealth to be $601,214. Applying the rule provided by G. L. c. 63, § 30, cl. 4, he found the proportion of the fair value of the capital stock which the value of the assets employed in business within the Commonwealth bore to the value of the total assets to be $503,429, from which he deducted the value of

[fol. 30]

motor vehicles amounting to $964, leaving $502,465 as the corporate excess employed within the Commonwealth. If in determining the value of intangible assets employed within the Commonwealth the value of the shares of subsidiaries had been omitted, and the proportion .19233 had been applied to the remaining $1,839,221, of intangible assets, the value of intangible assets employed in business within the Commonwealth would have been $353,737, and the corporate excess within the Commonwealth would have been $301,671.

Upon these facts the appellant makes two contentions; first, that it is engaged exclusively in interstate commerce and so was not subject to the excise, and, secondly, that in any event there should not have been included in the assets employed in business within the Commonwealth any part of the stock of its subsidiaries.

We find, for the reasons stated in the opinion below, that the business done by the appellant in Massachusetts was not exclusively interstate commerce, but that it did some local business as well. We find that the appellant's shares of stock in its subsidiaries were not employed in any business within the Commonwealth, and that a fair determination of the value of the intangible assets so employed would have been reached by applying the proportion obtained in accordance with the commissioner's ruling to the value of the remaining intangible assets. Accordingly we find that the amount of the corporate excess employed within the Commonwealth was $301,671. The amount of the excise which should have been assessed is therefore $1,508.36, and the appellant is entitled to an abatement of $1,003.97.

[fol. 31] OPINION

The excise tax imposed by G. L. c. 63, §§ 39-43, is levied "with respect to the carrying on or doing of business by it [a foreign corporation] within the Commonwealth." It has been described as "an excise for the commodity or privilege of having a place of business in Massachusetts with the protection of our laws and the financial, commercial and other advantages appertaining thereto." Judson Freight Forwarding Co. v. Commonwealth, 242 Mass. 47, 51. See Alpha Portland Cement Co. v. Commonwealth, 244 Mass. 530, 547-548. If a foreign corporation transacts only interstate business within the State it is not subject to the

excise. Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203. It is therefore presumed that the Legislature intended the section levying the excise (G. L. c. 63, § 39) to be applicable only to foreign corporations engaged in this Commonwealth in intrastate commerce and so subject to the taxing jurisdiction. W. & J. Sloane v. Commonwealth, 253 Mass. 529, 534. The first question to be decided, therefore, is whether the appellant was engaged exclusively in interstate commerce, or whether it also conducted a local or intrastate business warranting the exaction of an excise.

Unquestionably the negotiation of sales and shipment of lumber, under the circumstances found, are all interstate commerce. Marconi Wireless Telegraph Co. of America v. Commonwealth, 218 Mass. 558, 565. Carlos Ruggles Lumber Co. v. Commonwealth, 261 Mass. 450, 455. Cheney Brothers Co. v. Massachusetts, 246 U. S. 147, 153. But it is plain that the appellant is also doing business in Massachusetts which is not interstate. Its principal office is in Boston. Orders received from customers in New England are accepted at that office and remittances from them are received there. The appellant's most active bank account is in Boston. From that account the salesmen for the New England territory and such dividends as have been declared are paid. The corporate books and records and the certificates of stock of its subsidiaries are kept in Boston. It is inferable that its other securities are kept there also. The office of the treasurer is in Boston and directors' meetings are held there. These activities in our opinion are not [fol. 32] incidental instrumentalities of interstate commerce, but constitute a local business under the decisions. Marconi Wireless Telegraph Co. of America v. Commonwealth, 218 Mass. 558. Old Dominion Co. v. Commonwealth, 237 Mass. 269, 276-278. Carlos Ruggles Lumber Co. v. Commonwealth, 261 Mass. 450, 453. Cheney Brothers Co. v. Massachusetts, 246 U. S. 147. Compare Ozark Pipe Line Corp. v. Monier, 266 U. S. 555, 565-566.

The effect of the decision in Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, in its bearing on the validity of G. L. c. 63, § 39, was considered in W. & J. Sloane v. Commonwealth, 253 Mass. 529, 535, and the conclusion was reached, following Judson Freight Forwarding Co. v. Commonwealth, 242 Mass. 47, that "The excise imposed by § 39 is valid as to all foreign corporations within the natural scope of its words excepting only foreign corporations en-

gaged exclusively in interstate commerce." Section 39 provides that "every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the Commonwealth, an excise equal to the sum of" two factors, of which the first is "An amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the Commonwealth," and the second is a percentage of net income, not here material since the appellant had no net income. "Corporate excess employed within the Commonwealth" by a foreign corporation is defined by G. L. c. 63, § 30, cl. 4, as "such proportion of the fair value of its capital stock on the last day of the taxable year * * *, as the value of the assets, both real and personal, employed in any business within the Commonwealth on that date, bears to the value of the total assets of the corporation on said date," less the value of certain tangible property and securities described in subdivisions (a) and (b) thereunder. We have found that the stocks in the subsidiary corporations owned by the appellant were not employed in any business within the Commonwealth and should not have been included by the commissioner among the assets apportioned in accordance with his ruling. They were not employed in any real sense as an instrumentality for carrying on business in Massachusetts, but were the means, through the control of the corporations which they [fol. 33] gave, of enabling the appellant to acquire and ship, from points outside the State, the lumber needed for delivery to its customers.

The case is very different from National Leather Co. v. Commonwealth, 256 Mass. 419. In that case the petitioner was a foreign corporation doing a local business wholly in Massachusetts, which owned substantially all the stock of two subsidiaries, doing business and owning property largely in this State, and the petitioner made use of the activities of the subsidiaries as essential parts of its local business. It was held that, in computing under G. L. c. 63, § 30, cl. 4, the corporate excess employed within the Commonwealth for the purpose of assessing an excise tax under § 39, it was proper to include the stock of the subsidiaries as assets employed by the petitioner in business within the Commonwealth. The decision was affirmed in National Leather Co. v. Massachusetts, 277 U. S. 413, 422, 423. In the opinion the court said: "On the contrary, looking to the substance of the transactions and not merely to form, we think that the

petitioner, through its ownership of the capital stock of the two subsidiary corporations and the control which it thereby exercised over them, did, in a very real and practical sense, employ these stocks as an instrumentality in carrying on its business within Massachusetts—to the extent, at least, that the controlled activities and property of the subsidiary corporations were within the State." Here, on the other hand, all the business and property of the subsidiaries were outside Massachusetts. It follows that no part of the value of their stock owned by the appellant should be included in the value of the assets employed in business within the Commonwealth, in determining the appellant's corporate excess employed within the Commonwealth. Our computation of the amount of that corporate excess, of the excise which should have been assessed and of the abatement to which the appellant is entitled, has been made on that basis.

The appellant has filed requests for findings and requests for rulings. As to the requests for findings, those numbered 1, 3 and 6 are given, 2 is refused, and 4 and 5 are refused except as found herein. All the requests for rulings are [fol. 34] refused. As for 12 and 13 we think we should not go further than the rulings contained in this opinion.

Decision for the appellant; abatement granted in the amount of $1,003.97, with costs.

BEFORE BOARD OF TAX APPEALS

CLAIM OF APPEAL—Filed June 8, 1934

Now comes the Appellant, by its attorney, Robert C. McKay, and claims an appeal to the Supreme Judicial Court of this Commonwealth from the decision of the Board of Tax Appeals promulgated May 21st, 1934 refusing an abatement to the Appellant as prayed for in its petition. This appeal is claimed by reason of the following errors of law alleged to have been made by the Board of Tax Appeals:

1. The Board of Tax Appeals is in error (second paragraph of Opinion, second sentence) in its conclusion:

"But it is plain that the Appellant is also doing business in Massachusetts which is not interstate."

2. The Board of Tax Appeals is in error (second paragraph of Opinion, last sentence) in its conclusion:

"These activities in our opinion are not incidental instrumentalities of interstate commerce, but constitute a local business under the decisions."

3. The Board of Tax Appeals is in error in its conclusion that the imposition of a tax under Chapter 63 of the General Laws on the Appellant is valid and not unconstitutional as a direct burden on interstate commerce in contravention of the Commerce Clause embodied in Section 8 of Article I of the Constitution of the United States.

4. The Board of Tax Appeals is in error in its conclusion that the imposition of the tax under Chapter 63 of the General Laws on the Appellant is valid and not unconstitutional [fol. 35] as a tax upon the property of the Appellant situated without the limits of the Commonwealth of Massachusetts thereby depriving the Appellant of its property without due process of law in contravention of the 14th amendment to the Constitution of the United States.

5. The Board of Tax Appeals is in error in refusing the Appellant's Requests for Rulings of Law numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11.

The Atlantic Lumber Company, by its attorney,
Robert C. McKay.

Filed June 22, 1934.

[File endorsement omitted.]

[fol. 36] BEFORE BOARD OF TAX APPEALS

AFFIDAVIT OF SERVICE OF CLAIM OF APPEAL AND NOTICE OF ENTRY OF APPEAL

I, Robert C. McKay, in behalf of The Atlantic Lumber Company, hereby make affidavit that I served by registered mail upon the Commissioner of Corporations and Taxation, the adverse party in this proceeding, copies of claim of appeal and notice of entry appeal, as required by G. L. (Ter. Ed.) C. 58 (a), Sec. 13.

Robert C. McKay.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Then personally appeared the above named Robert C. McKay and made oath that the above affidavit subscribed by him is true to the best of his knowledge and belief

Madalene MacWhinnie, Notary Public. My commission expires Oct. 19, 1939. (Seal.)

June 26, 1934.
Filed June 26, 1934.

[fol. 37] IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

OPINION

RUGG, C. J.:

This is an appeal from a decision by the Board of Tax Appeals. G. L. (Ter. Ed.) c. 58A, § 13, as most recently amended by St. 1933, c. 321, § 7, and c. 350, § 8. By that decision a partial abatement of the excise tax of the taxpayer was granted about which no question now is raised; but the claim for abatement of the entire tax was denied. The single issue presented is whether the tax constituted a burden upon the interstate commerce of the taxpayer so as to be beyond the power of the Commonwealth and an infringement upon the powers vested exclusively in the United States, and was a deprivation of its property without due process of law.

The facts are these: The taxpayer is a corporation organized under the laws of Delaware. Its business is dealing in lumber at wholesale. Its principal office is in Boston in this Commonwealth. It maintains sales offices in Boston and in Buffalo in the State of New York. Its Boston office is used as the headquarters of salesmen who solicit orders in this Commonwealth, in other New England States and in a part of the State of New York, and for carrying on correspondence and other business activities in connection with the receipt of orders and shipment of goods for that territory. Orders obtained by such salesmen are accepted at the Boston office and are filled from the distributing yard of the taxpayer at Buffalo, or from the mill of some subsidiary outside of this Commonwealth. Lumber is shipped from those points, always in carload lots, directly to the

customer. Remittances from customers in the New England States are made to the Boston office. No stocks of lumber are kept in this Commonwealth. The only tangible [fol. 38] property kept in this Commonwealth is office furniture and equipment and salesmen's automobiles. Bank accounts are maintained in Boston, in Brooklyn, Buffalo and New York in the State of New York, and in Toronto in Canada. The Boston account is the most active and next to the largest in amount. The Boston salesmen are paid from that account. The corporate books and records are kept in Boston, the treasurer is located there, and directors' meetings are held there. Dividends on the preferred stock have been paid out of the Boston bank account, including two in 1931. No dividends have been paid on the common stock. The taxpayer had no net income derived from business carried on within the Commonwealth. The corporate excess employed within this Commonwealth was determined by the defendant and the excise calculated on it was paid by the taxpayer. No contention is made that in these particulars the statutory provisions were not followed or that the calculations were not correct.

The tax here assailed was levied under G. L. (Ter. Ed.) c. 63, §§ 39-43. Its essential provisions are that a "foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the Commonwealth, an excise equal to the sum" of a percentage on the corporate excess employed by it in this Commonwealth and a percentage on its net income attributable to business done in this Commonwealth. The second of these two factors may be disregarded in the case at bar, since the taxpayer had no such income and no part of the excise assessed had any reference to such income.

The true character of the tax thus authorized now is settled. It is confined solely to foreign corporations doing intrastate business within the Commonwealth. It does not [fol. 39] apply to those engaged exclusively in interstate commerce. It is not a franchise tax on the right to exist as a corporation. It is not a tax on tangible or other property.

It is not an income tax. It is measured by property and net income fairly attributable to the business done within the Commonwealth. It is an excise for the commodity or privilege of having a place for the transaction of intrastate business in Massachusetts with the protection of our laws and the financial, commercial and other advantages apper-

taining thereto. Judson Freight Forwarding Co. v. Commonwealth, 242 Mass. 47, 51. W. & J. Sloane v. Commonwealth, 253 Mass. 529, 532. Carlos Ruggles Lumber Co. v. Commonwealth, 261 Mass. 450, 452-453. Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 213-216.

The first point for decision is whether upon the facts already recited the taxpayer was carrying on intrastate business within the Commonwealth, or whether its business activities were confined exclusively to interstate commerce. Doubtless certain of its activities were interstate commerce; but others were not. The principal office of the taxpayer was in Boston. Its most active bank account was there. Corporate books and records were kept there; the location of its treasurer with all its implications was there; the dividends were paid and the meetings of its directors were held there. These are corporate functions which are not interstate commerce. That this constituted local and intrastate business which subjected the foreign corporation to the excise tax of this Commonwealth seems to us to be settled by the decision in Cheney Brothers v. Massachusetts, 246 U. S. 147, where at pages 155, 156 was affirmed the decision of this court in Marconi Wireless Telegraph Co. v. Commonwealth, 218 Mass. 558, 576-579, as to the [fol. 40] Copper Range Company and the Champion Copper Company. Those cases related to an earlier excise tax statute than the one here involved, but the decision turned on the precise point here raised, whether the business subjected to the tax was local or interstate commerce. The objections to that tax were based on the commerce clause of the Federal Constitution and on the due process and equal protection clauses of the Fourteenth Amendment. The entire decision of the United States Supreme Court with reference to those two corporations was in these words: "Copper Range Company This is a Michigan corporation whose articles of association contemplate that it shall have an office in Boston. It is a holding company and owns various corporate stocks and bonds and certain mineral lands in Michigan. Its activities in Massachusetts consist in holding stockholders' and directors' meetings, keeping corporate records and financial books of account, receiving monthly dividends from its holdings of stock, depositing the money in Boston banks and paying the same out, less salaries and expenses, as dividends to its stock-

holders three or four times a year. The exaction of a tax for the exercise of such corporate faculties is within the power of the State. Interstate commerce is not affected. Champion Copper Company. This is another Michigan corporation which maintains an office in Boston pursuant to a provision in its articles of association. It deposits the proceeds of its mining and smelting business in Michigan in Boston banks and, after paying salaries and expenses, distributes the balance in dividends from its Boston office. The management of its mine is under the control of a general manager in Michigan and he in turn is under the control of the company's directors. The meetings of the latter, which occur several times a year, are held [fol. 41] in the Boston office. At these meetings the directors receive reports from the treasurer and general manager, vote dividends, elect officers, and authorize the execution of deeds and the like for lands in Michigan. These corporate activities in Massachusetts are not interstate commerce and may be made the basis of an excise tax by that State." The decision of those two cases on this point has been cited with approval. Ozark Pipe Line Corp. v. Monier, 266 U. S. 555, 566, 567. Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 217. It was said of it in a dissenting opinion in Cudahy Packing Co. v. Hinkle, 278 U. S. 460, 468: "That decision was made by a unanimous Court after much deliberation. It has never been disapproved." We are unable to perceive any difference in the facts of those cases and those in the one at bar. So far as concerns the essential character of the tax statutes involved in those cases and in the case at bar, it is the same. To the same effect in principle are Old Dominion Co. v. Commonwealth, 237 Mass. 269, 276-278, and Carlos Ruggles Lumber Co. v. Commonwealth, 261 Mass. 450. The case at bar seems to us quite distinguishable from Cheney Brothers Co. v. Massachusetts, 246 U. S. 147, 153-154, reversing 218 Mass. 558, 569-573.

The taxpayer relies strongly upon Ozark Pipe Line Corp. v. Monier, 266 U. S. 555. In that case a corporation organized under the laws of Maryland operated a pipe line from Oklahoma through Missouri to a point in Illinois, through which crude petroleum was conducted. No oil was received or delivered in Missouri. The principal office of the corporation was maintained in Missouri, and its bank

accounts and books were there. It does not appear that its directors' meetings were held in Missouri, that its treasurer was located there, or that its dividends were paid there. The court in its opinion stressed the fact that the [fol. 42] corporate activities at the Missouri office were solely in furtherance of interstate transportation of oil in the pipe line. In holding that the franchise tax levied by the State of Missouri was invalid as a burden on interstate commerce, the cases in 246 U. S. 147, 155-156 (to which we have already adverted) were affirmed by stating at page 566: "The fourth and fifth were mining companies operating mines in Michigan with offices in Boston where their directors met, declared and paid dividends, etc. Interstate commerce was not affected." In the case at bar these activities and others constituting the corporate life of the taxpayer were carried on in this Commonwealth. In Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218, the State franchise tax held repugnant to the Federal Constitution was imposed upon a New York corporation with its principal offices in New York, and only an importing business in Alabama.

The tax in the case at bar may have some remote effect upon the business of the taxpayer, but no more than that of any local ad valorem tax which under established principles may be placed upon tangible and intangible property within the Commonwealth without so burdening interstate commerce as to be an interference with the Federal power of regulation. In Virginia v. Imperial Coal Sales Co. Inc. 293 U. S. 15, a "capital tax" computed upon the value of stock on hand, excess of bills and accounts receivable over bills and accounts payable, cash on hand and on deposit, and other intangibles located in Virginia, was sustained. The local business appears to have been inseparable from its interstate business which was selling coal for foreign coal mining corporations, none of any consequence being located or sold in Virginia. The effect of the excise on the taxpayer in the circumstances disclosed in the instant case [fol. 43] is as remote from interstate commerce as in the Virginia case. It is based upon that proportion of its tangibles and intangibles deemed to be employed in this Commonwealth. The effect upon interstate commerce is at most incidental and remote. The fact that it may be paid from profits derived from interstate commerce does not render

it a burden on such business. Edelman v. Boeing Air Transport, Inc. 289 U. S. 249.

It has not been argued in behalf of the taxpayer that its intrastate business is inseparable from its interstate business. Therefore, that question need not be considered. One single point urged on this aspect of the case is that the taxpayer does no intrastate business.

Another contention of the taxpayer is that it has been deprived of property without due process of law. The tax, as already demonstrated, is in both form and substance an excise and not a property tax. The aim of the statute is to measure the excise by property correctly determined to be allocated to the business in this Commonwealth. The taxpayer does not point out any property outside the Commonwealth which has been taxed. A part of its intangibles, such as cash and deposits in banks, without question is allocable to Massachusetts. No foundation is found in the facts presented for the contention that property not having a situs in the Commonwealth has been taxed. The taxpayer cannot upon this record question the allocation made by the defendant. Alpha Portland Cement Co. v. Commonwealth, 248 Mass. 156.

The excise here assailed conforms to the test recently laid down in Cooney v. Mountain States Telephone & Telegraph Co. 294 U. S. 384, at page 393, in these words: "Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is [fol. 44] imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business."

The conclusion is that the abatement is granted in the sum found by the Board of Tax Appeals with costs, and that the costs of this appeal are to be assessed against The Atlantic Lumber Company. G. L. (Ter. Ed.) c. 58A, § 13, as amended by St. 1933, c. 321, § 7.

So ordered.

[fol. 45] IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESCRIPT—Filed Sept. 17, 1935

In the Case of

ATLANTIC LUMBER COMPANY

vs.

COMMISSIONER OF CORPORATIONS AND TAXATION

pending in the Supreme Judicial Court for the County of Suffolk:

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,—

Abatement granted in the sum found by the board of tax appeals, with costs; and costs of this appeal to be assessed against the Atlantic Lumber Company.

By the Court.

Walter F. Frederick, Clerk.

September 12, 1935.

Brief Statement of the Grounds and Reasons of the Decision

The reasons of the decision are set forth at length in the opinion, filed with the Reporter of Decisions, to which reference is made.

[fol. 46] IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

THE ATLANTIC LUMBER CO.

v.

COMMISSIONER OF CORPORATIONS AND TAXATION

FINAL ORDER

An abatement of an excise for the year 1932 is granted to the appellant, The Atlantic Lumber Co., in the sum of $1,003.97, this sum to bear interest at the rate of 6% per annum from October 20, 1932; the appellant, The Atlantic Lumber Co., is also to recover its costs before the Board of

Tax Appeals to be taxed by said board, and the total of such amounts shall be paid to the appellant, The Atlantic Lumber Co., by the State Treasurer.

And it is further ordered that the costs of the appeal in the Supreme Judicial Court in the sum of $25.19 are to be paid to the appellee, the Commissioner of Corporations and Taxation, by the appellant, The Atlantic Lumber Co., and that execution shall issue therefor.

By the Court (Lummus, J.):

Charles S. O'Connor, Clerk.

Entered December 3, 1935.

[fol. 47] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS TO THE SUPREME COURT OF THE UNITED STATES—Filed Dec. 24, 1935

To the Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts:

Your Petitioner, The Atlantic Lumber Company, respectfully shows:

1. Your Petitioner is the Appellant in the above entitled cause.

2. Your Petitioner seasonably filed an application for the abatement of the Massachusetts Corporate Excise Tax assessed to your Petitioner for the year 1932 under Chapter 63 of the General Laws of the Commonwealth of Massachusetts. This application was denied by the Commissioner of Corporations and Taxation on May 3, 1933 and your Petitioner duly filed an appeal from this decision with the Massachusetts Board of Tax Appeals. In this appeal the validity of said Chapter 63 of the General Laws, as amended, was drawn in question on the ground that the said statute was repugnant to the Constitution of the United States. On May 21, 1934, the Massachusetts Board of Tax Appeals promulgated a decision in favor of your Petitioner to the extent that a partial abatement of the

[fol. 48] excise tax of the Petitioner was granted, about which no question is now raised, but the contention of the Petitioner that the entire tax was invalid was denied and the decision was in favor of the validity of said Chapter 63 of the General Laws.

3. An appeal from said decision to the Supreme Judicial Court of the Commonwealth of Massachusetts was taken and the decision of the Massachusetts Board of Tax Appeals was affirmed by said Supreme Judicial Court in an opinion dated the 16th day of September, 1935 and a final order in accordance with said opinion was entered on December 3, 1935.

4. The Supreme Judicial Court of the Commonwealth of Massachusetts is the highest court of said Commonwealth in which a decision in this suit may be had.

5. In said cause there is drawn in question the validity of a statute of the Commonwealth of Massachusetts on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity, in that Chapter 63 of the General Laws of the Commonwealth of Massachusetts, as amended, has been held valid and not in violation of the Constitution of the United States in that it levies a tax that is a direct burden on interstate commerce in contravention of the Commerce Clause embodied in Section 8 of Article I of the Constitution of the United States; and in that said Chapter 63 of the General Laws of the Commonwealth of Massachusetts, as amended, has been held valid and not in violation of the Constitution of the United States in that it levies a tax upon the property of your Petitioner situated without the limits of the Commonwealth of Massachusetts thereby depriving your Petitioner of its property without due process of law in contravention of the 14th Amendment to the Constitution of the United States.

[fol. 49] 6. Your Petitioner, therefore, respectfully shows this Court that in accordance with sec. 237 (a) of the Judicial Code and in accordance with the Rules of the Supreme Court of the United States, the case is one which, under the legislation in force when the Act of January 31st, 1928 was passed, to wit, under sec. 237 (a) of the Judicial Code, a review could be had in the Supreme Court of the United States as a matter of right on a writ of error.

7. The errors on which your Petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors, filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States; and there is likewise filed, herewith, a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your Petitioner prays for the allowance of an appeal from said Supreme Judicial Court of the Commonwealth of Massachusetts to the Supreme Court of the United States, in order that the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this case, duly authenticated by the Clerk of the Supreme Judicial Court of the Commonwealth of Massachusetts may be sent to the Supreme Court of the United States as provided by law, and that an order be made touching the security to be provided by the Petitioner, and that the bond tendered by the Petitioner be approved.

(Signed) Robert C. McKay, Attorney for Petitioner.

[fol. 49½] [File endorsement omitted.]

[fol. 50] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed Dec. 24, 1935

The Petitioner assigns the following errors in the record and proceedings in this cause:

1. The Supreme Judicial Court of the Commonwealth of Massachusetts erred in holding and deciding that the tax imposed by Chapter 63 of the General Laws of the Commonwealth of Massachusetts was applicable to your Petitioner by reason of which it has in effect held that said tax may be imposed on a foreign corporation engaged exclusively in interstate commerce within the Commonwealth of Massachusetts and that such construction would

not be in violation of the Commerce Clause embodied in Section 8 of Article I of the Constitution of the United States.

2. The Supreme Judicial Court of the Commonwealth of Massachusetts erred in holding and deciding that the tax imposed by Chapter 63 of the General Laws of the Commonwealth of Massachusetts was applicable to your Petitioner by reason of which it has in effect held that said tax may be imposed on a foreign corporation engaged exclusively in interstate commerce within the Commonwealth of Massachusetts and that such construction would not be in violation of the 14th Amendment to the Constitution of the United States.

[fol. 51] 3. The Supreme Judicial Court of the Commonwealth of Massachusetts erred in holding and deciding that the method of allocating the intangible assets of the Petitioner adopted by the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts was a reasonable method of allocating the value of said intangible assets for the purpose of the tax imposed by Chapter 63 of the General Laws of the Commonwealth of Massachusetts by reason of which it has in effect held that said tax may be imposed on the interstate business of a foreign corporation and that such construction would not be in violation of the Commerce Clause embodied in Section 8 of Article I of the Constitution of the United States.

4. The Supreme Judicial Court of the Commonwealth of Massachusetts erred in holding and deciding that the method of allocating the intangible assets of the Petitioner adopted by the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts was a reasonable method of allocating the value of said intangible assets for the purpose of the tax imposed by Chapter 63 of the General Laws of the Commonwealth of Massachusetts by reason of which it has in effect held that the said tax may be imposed on property of a foreign corporation situated without the limits of the Commonwealth of Massachusetts and that such construction would not be in violation of the 14th Amendment to the Constitution of the United States.

5. In said suit there was drawn in question the validity of Chapter 63 of the General Laws of the Commonwealth

of Massachusetts on the ground that it was repugnant to the Constitution of the United States in that it levied a tax that is a direct burden on interstate commerce in contra-
[fol. 52] vention of the Commerce Clause embodied in Section 8 of Article I of the Constitution of the United States, and the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts was in favor of the validity of said statute, which decision is hereby assigned as error.

6. In said suit there was drawn in question the validity of Chapter 63 on the ground that it was repugnant to the Constitution of the United States in that it levied a tax against property situated without the limits of the Commonwealth of Massachusetts in contravention of the 14th Amendment to the Constitution of the United States, and the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts was in favor of the validity of said statute which decision is hereby assigned as error.

Wherefore, on account of the errors hereinbefore assigned, your Petitioner prays that the said order of the Supreme Judicial Court of the Commonwealth of Massachusetts dated the 3rd day of December, 1935, in the above entitled cause, in so far as it denies the abatement of the entire tax assessed to your Petitioner under Chapter 63 of the General Laws of the Commonwealth of Massachusetts, be reversed and an order be entered in favor of this Appellant.

(Signed) Robert C. McKay, Attorney for Appellant.

[fol. 52½] [File endorsement omitted.]

[fol. 53] Supreme Court of the United States

[Title omitted]

Order Allowing Appeal—Filed Dec. 24, 1935

The Appellant in the above entitled cause having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the order made and entered in the above entitled cause by the Supreme Judicial Court of the Commonwealth of Massachusetts on the 3rd

day of December, 1935 and having presented and filed its petition for appeal, assignments of error, prayer for reversal, and statement as to jurisdiction, pursuant to the statutes and Rules of the Supreme Court of the United States in such case made and provided:

It is now ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Judicial Court of the Commonwealth of Massachusetts in the above entitled cause, as provided by law and it is further ordered that the Clerk of the Supreme Judicial Court of the Commonwealth of Massachusetts should prepare and certify a transcript of the record, proceedings and order in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said court within forty (40) days of this date.

[fol. 54] And it is further ordered that security for costs on appeal be fixed in the sum of $500.

Dated December 20, 1935.

Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts.

[fol. 54½] [File endorsement omitted.]

[fols. 55 & 56] Bond on appeal for $500.00, approved and filed Dec. 24, 1935, omitted in printing.

[fols. 57 & 58] Citation, in usual form, showing service on James J. Ronan, filed Dec. 24, 1935, omitted in printing.

[fol. 58½] [File endorsement omitted.]

[fol. 59] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed Jan. 14, 1936

It is hereby stipulated and agreed by and between Robert C. McKay, Attorney for The Atlantic Lumber Company,

above named, and James J. Ronan, Attorney for Commissioner of Corporations and Taxation, above named, that the portions of the record which shall constitute the transcript of record on appeal to the Supreme Court of the United States herein shall consist of the following:

1. Printed copy of record on appeal to Supreme Judicial Court from the Massachusetts Board of Tax Appeals including photostatic copy of tax return filed by The Atlantic Lumber Company.
2. Opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts, dated September 16, 1935.
3. Rescript.
4. Final order of Supreme Judicial Court entered December 3, 1935.
5. Petition for Appeal from the Supreme Judicial Court of the Commonwealth of Massachusetts to the Supreme Court of the United States.

[fol. 60] 6. Assignment of Errors and Prayer for Reversal.

7. Order Allowing Appeal.
8. Statement as to Jurisdiction.
9. Bond on Appeal.
10. Original of Citation on Appeal.
11. Notice under Rule 12.
12. This Stipulation.

This stipulation is made and entered into pursuant to Rule 10 of the Rules of the Supreme Court of the United States.

Dated this 10th day of January, 1936.

Robert C. McKay, James J. Ronan, Asst. Atty. Gen.

[fol. 60½] [File endorsement omitted.]

[fol. 61] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Jan. 25, 1936

Comes now the Appellant in the above entitled cause and adopts its Assignment of Errors as its statement of points.

to be relied upon and states that the whole of the record, as filed, is necessary for the consideration of the case.

Dated at Boston, Massachusetts, January 24, 1936.

Robert C. McKay, Attorney for Appellant.

Service of the above and foregoing statement is hereby admitted and receipt of a copy thereof acknowledged this 25th day of January, 1936.

James J. Ronan, Asst. Atty. Gen. of Mass., Counsel for Appellee.

[fol. 62] [File endorsement omitted.]

Endorsed on cover: File No. 40,269. Massachusetts Supreme Judicial Court. Term No. 715. The Atlantic Lumber Company, appellant, vs. Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts. Filed January 24, 1936. Term No. 715, O. T., 1935.

FILE COPY

JAN 24 1936

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 715

THE ATLANTIC LUMBER COMPANY,
Appellant,

vs.

COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

STATEMENT AS TO JURISDICTION.

ROBERT C. MCKAY,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 715

THE ATLANTIC LUMBER COMPANY,
Appellant,

vs.

COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS,
Appellee.

STATEMENT AS TO JURISDICTION.

Pursuant to Rule 12 of the Rules of the United States Supreme Court, the Appellant files this statement disclosing the basis upon which it is contended that the United States Supreme Court has jurisdiction upon appeal.

(a) The case is one which, under legislation in force when the Act of January 31, 1928, was passed, to wit, under Sec. 237 (a) of the Judicial Code, a review could be had in the Supreme Court of the United States as a matter of right on a writ of error in that there is drawn in question the validity of a statute of the Commonwealth of Massachusetts on the ground of it being repugnant to the Con-

stitution of the United States and the decision is in favor of its validity.

(b) The statute of the Commonwealth of Massachusetts, the validity of which is involved, is Chapter 63 of the General Laws of the Commonwealth of Massachusetts (pages 785-793, General Laws of the Commonwealth of Massachusetts, Tercentenary Edition). This statute provides that "Every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the Commonwealth, an excise equal to the sum of * * * five dollars per thousand upon the value of the Corporate Excess employed by it within the Commonwealth" and "two and one-half per cent of that part of its net income * * * which is derived from business carried on within the Commonwealth;" (G. L. Ter. Ed., C. 63, Sec. 39, page 791).

"'Corporate Excess employed within the Commonwealth' by a foreign corporation * * * (shall be) such proportion of the fair value of its capital stock on the last day of the taxable year * * * as the value of its assets, both real and personal, employed in any business within the Commonwealth on that date, bears to the value of the total assets of the corporation on said date" (G. L. Ter. Ed., C. 63, Sec. 30 (4)). The method of apportioning the intangible assets of a foreign corporation to Massachusetts is not set out in the statute but is covered by a Regulation of the Commissioner of Corporations and Taxation and this Regulation was held to be in conformity with the statute by the Massachusetts Supreme Judicial Court in *Alpha Portland Cement Co.* v. *Commonwealth*, 248 Mass. 156,161. This Regulation (No. 2505, Rules and Regulations of the Commissioner of Corporations and Taxation) provides in effect that the apportionment shall be made on the same basis as that provided by the statute for the allocation of the so

called remainder of Net Income. This allocation is based on three factors which are given equal weight in apportioning the remainder of Net Income and the intangible assets of a foreign corporation (G. L. Ter. Ed., C. 63, Sec. 38, page 789). The first factor is based on the value of the Corporation's tangible property situated within the Commonwealth and one-third of the remainder of Net Income and one-third of the value of the intangible assets is allocated by multiplying by a fraction whose numerator is the value of the Corporation's tangible property situated in Massachusetts and the denominator is the total value of the Corporation's property wherever situated. The second factor is based on wages, salaries and commissions paid employees which are assignable to Massachusetts. "The amount assignable to this commonwealth of expenditure of the corporation for wages, salaries, commissions or other compensation to its employees shall be such expenditure for the taxable year as represents the compensation of employees not chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the Commonwealth" (G. L. Ter. Ed., C. 63, Sec. 38 (5), page 789). One-third of the remainder of net income and one-third of the value of the intangible assets is therefore allocated by multiplying by a fraction whose numerator is the wages, salaries and commissions so assignable to Massachusetts and the denominator is the total expenditure of the corporation for wages, salaries and commissions. The third factor is based on gross receipts from sales assignable to Massachusetts. "The amount of the corporation's gross receipts from business assignable to this commonwealth shall be the amount of its gross receipts for the taxable year from (a) sales, except those negotiated or effected in behalf of the corporation by agents or agencies chiefly situated at, connected with or sent out from premises for the

transaction of business owned or rented by the corporation outside the commonwealth and sales otherwise determined by the Commissioner to be attributable to the business conducted on such premises" (G. L. Ter. Ed., C. 63, Sec. 38 (6) page 789). The remaining third of the remainder of net income and the value of intangible assets is therefore allocated by multiplying by a fraction whose numerator is the gross receipts from sales so assigned to Massachusetts and whose denominator is the amount of the corporation's gross receipts from all its business.

The statute further provides for a minimum tax, annual returns and additional information to be furnished when demanded by the Commissioner of Corporations and Taxation. The Attorney General may obtain an injunction restraining the further prosecution of business by a foreign corporation which refuses to pay the tax (G. L. Ter. Ed., C. 63, Sec. 75).

This same statute was before the United States Supreme Court in *Alpha Portland Cement Co.* v. *Commonwealth*, 266 U. S. 203, on a writ of error. The decision in that case was that the tax imposed by this statute was unconstitutional when imposed on a foreign corporation engaged exclusively in interstate commerce within Massachusetts. In the case at bar the Supreme Judicial Court of the Commonwealth of Massachusetts has ruled that the Appellant is not engaged exclusively in interstate commerce in Massachusetts and that the tax imposed by said statute is valid and not a direct burden on interstate commerce in contravention of the Commerce Clause embodied in Section 8 of Article I of the Constitution of the United States and that it does not deprive the Appellant of its property without due process of law in contravention of the 14th Amendment to the Constitution of the United States. The Appellant contends that it is engaged exclusively in interstate commerce in Massachusetts within the rule laid down in *Ozark Pipe Line Co.* v.

Monier, 268 U. S. 555, and irrespective of whether it is held to be engaged exclusively in interstate commerce in Massachusetts the said statute, as construed by the Supreme Judicial Court of the Commonwealth of Massachusetts is invalid as a direct burden on interstate commerce in contravention of Section 8 of Article I of the Constitution of the United States and that it is also invalid as depriving the Appellant of its property without due process of law in contravention of the 14th Amendment to the Constitution of the United States.

(c) The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts was filed September 16, 1935 and a final order was entered in accordance with such opinion on December 3, 1935. The application for this appeal was presented December 11, 1935.

Respectfully submitted,

ROBERT C. MCKAY,
Attorney for Appellant.

FILE COPY

JAN 24 1936

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 715

THE ATLANTIC LUMBER COMPANY,

Appellant,

vs.

COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

APPEAL FROM THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

PAUL A. DEVER,
Attorney General of Massachusetts.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 715

THE ATLANTIC LUMBER COMPANY,

Appellant,

vs.

COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS,

Appellee.

GROUNDS AGAINST THE COURT TAKING JURISDICTION OF THE APPEAL AND A MOTION TO DISMISS.

Now comes the appellee in the above-entitled case and says that this is an appeal from an opinion of the Supreme Judicial Court of Massachusetts filed September 16, 1935, and reported as *The Atlantic Lumber Company* v. *Commissioner of Corporations and Taxation,* 1935 Advanced Sheets 2053, upholding an excise tax imposed upon the appellant, a Delaware corporation, upon the ground that it was conducting an intrastate business in Massachusetts. The single issue calling for determination upon this appeal is whether

the appellant was carrying on a local business within the taxing state.

The basis for the decision of the Massachusetts Court appears from the decision, which states that——

> "The first point for decision is whether upon the facts already cited the taxpayer was carrying on intrastate business within the Commonwealth, or whether its business activities were confined exclusively to interstate commerce. Doubtless certain of its activities were interstate commerce; but others were not. The principal office of the taxpayer was in Boston. Its most active bank account was there. Corporate books and records were kept there; the location of its treasurer with all its implications was there; the dividends were paid and the meetings of its directors were held there. These are corporate functions which are not interstate commerce. That this constituted local and intrastate business which subjected the foreign corporation to the excise tax of this Commonwealth seems to us to be settled by the decision in *Cheney Brothers Co.* v. *Massachusetts*, 246 U. S. 147, where at pages 155, 156 was affirmed the decision of this court in *Marconi Wireless Telegraph Co.* v. *Commonwealth*, 218 Mass. 558, 576-579, as to the Copper Range Company and the Champion Copper Company. Those cases related to an earlier excise tax statute than the one here involved, but the decision turned on the precise point here raised, whether the business subjected to the tax was local or intrastate. The objections to that tax were based on the commerce clause of the Federal Constitution and on the due process and equal protection clauses of the Fourteenth Amendment. The entire decision of the United States Supreme Court with reference to those two corporations was in these words: 'COPPER RANGE COMPANY. This is a Michigan corporation whose articles of association contemplate that it shall have an office in Boston. It is a holding company and owns various corporate stocks and bonds and certain mineral lands in Michigan. Its activities

in Massachusetts consist in holding stockholders' and directors'' meetings, keeping corporate records and financial books of account, receiving monthly dividends from its holdings of stock, depositing the money in Boston banks and paying the same out, less salaries and expenses, as dividends to its stockholders three or four times a year. The exaction of a tax for the exercise of such corporate faculties is within the power of the State. Interstate commerce is not affected. CHAMPINION COPPER COMPANY. This is another Michigan corporation which maintains an office in Boston pursuant to a provision in its articles of association. It deposits the proceeds of its mining and smelting business in Michigan in Boston banks and, after paying salaries and expenses, distributes the balance in dividends from its Boston office. The management of its mine is under the control of a general manager in Michigan and he in turn is under the control of the company's directors. The meetings of the latter, which occur several times a year, are held in the Boston office. At these meetings the directors receive reports from the treasurer and general manager, vote dividends, elect officers, and authorize the execution of deeds and the like for lands in Michigan. These corporate activities in Massachusetts are not interstate commerce and may be made the basis of an excise tax by that State.' The decision of those two cases on this point has been cited with approval. *Ozark Pipe Line Co.* v. *Monier,* 266 U. S. 555, 566, 567. *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203, 217.''

The appellee further submits that the sole question at issue was settled by the case of *Cheney Brothers Co.* v. *Massachusetts,* and, therefore, says that there is no merit in the appeal, and moves that the said appeal be dismissed.

PAUL A. DEVER,
Attorney General,
Counsel for the Appellee.

(7358-C)

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Office Supreme Court.
FILED
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CHARLES ELMORE CRO
Clerk

In the

Supreme Court of the United States.

October Term, 1935.

No. 715.

The Atlantic Lumber Company,
Appellant,

v.

Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts,
Appellee.

BRIEF FOR APPELLANT.

ROBERT C. McKAY,
Attorney for Appellant.

Rockwell & Churchill Press, Boston.

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In the

Supreme Court of the United States.

October Term, 1935.

No. 715.

THE ATLANTIC LUMBER COMPANY,
Appellant,
v.
COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS,
Appellee.

BRIEF FOR APPELLANT.

Statement of the Case.

(a) *General.*

This is an appeal from an order of the Supreme Judicial Court of the Commonwealth of Massachusetts affirming a decision of the Massachusetts Board of Tax Appeals in an appeal from the refusal of the Commissioner of Corporations and Taxation to abate an excise tax assessed to the appellant for the year 1932 under the provisions of sections 39-43 of chapter 63 of the General Laws of the Commonwealth of Massachusetts (App. p. 41). In this appeal it was contended by the appellant that said chapter 63 did not apply to its business and that, if so construed, it was invalid as a burden on interstate commerce in violation of

section 8 of article I of the Constitution of the United States, and also invalid as depriving the appellant of its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States (Contentions of Law 1, 2, 3, 4, 6, and 7, Rec. pp. 4-5). The decision of the Board of Tax Appeals allowed a partial abatement of the tax on grounds not at issue in this appeal, but was against the other contentions of the appellant and in favor of the validity of said chapter 63 (Rec. pp. 28-31). From this decision the appellant appealed to the Supreme Judicial Court pursuant to the provisions of G.L. c. 58A, sec. 13 (App. pp. 35-38), assigning as error the conclusions of the Board of Tax Appeals that said chapter 63 applied to the business of the appellant and that as so construed it was valid and not in violation of the Constitution of the United States (Claim of Appeal, Assignment of Errors 1, 2, 3, and 4, Rec. pp. 31-32).

The opinion of the Supreme Judicial Court (Rec. pp. 33-38) affirmed the decision of the Board of Tax Appeals and was likewise in favor of the validity of said chapter 63. A final order in accordance with said opinion was entered December 3, 1935 (Rec. pp. 39, 40), and the application for appeal to this Court was presented December 11, 1935.

(*b*) *Findings of Fact.*

The facts in the case are stated in the "Findings of Fact" contained in the decision of the Board of Tax Appeals (Rec. pp. 25-28). The findings of the Board pertinent to the present appeal are as follows:

"The appellant is a foreign corporation, organized under the laws of Delaware. Its principal office is in Boston and it maintains sales offices in Boston and in Buffalo, New York. Its business is dealing in lumber at wholesale. It

duly filed an excise tax return for the year 1932. The commissioner found that the appellant had no net income derived from business carried on within the Commonwealth and determined the corporate excess employed within the Commonwealth to be $502,465. Accordingly he assessed to the appellant an excise in the amount of $2,512.33, which was paid on October 20, 1932. The appellant seasonably applied for an abatement, claiming that the tax was illegally assessed because its business in Massachusetts was exclusively interstate commerce, and that in computing the appellant's corporate excess employed within the Commonwealth the commissioner had wrongly included a portion of the value of certain securities owned by the appellant in its assets employed in business within the Commonwealth. The application was denied and notice of the commissioner's decision was given on May 3, 1933. The appellant then appealed to this board.

"The appellant's Boston office is used as the headquarters for salesmen who solicit orders in Massachusetts and other New England States and in a part of New York State, and for carrying on correspondence and other business activities in connection with the receipt of orders and shipment of goods for that territory. Orders obtained by the salesmen from Boston are accepted at the Boston office and are filled from the appellant's distributing yard at Buffalo, New York, or from the mill of some subsidiary outside Massachusetts. Lumber is shipped directly from those points, always in carload lots, to the customer. Remittances from customers in the New England States are made to the Boston office. No stocks of lumber are kept in Massachusetts. The only tangible property in this State is office furniture and equipment and salesmen's automobiles. The appellant maintains bank accounts in Boston, New York City, Buffalo, Brooklyn and Toronto, Canada, the Boston account being the most active and next to the largest in

size. The Boston salesmen are paid from that account. The corporate books and records are kept in Boston, its treasurer is located there, and directors' meetings are held there. Dividends declared on the preferred stock of the appellant have been paid out of the Boston bank account, including two in 1931. No dividends have been paid on the common stock.

. . . . . .

"The appellant in its return reported the value of the shares of stock of its subsidiaries, at their book values, to be $1,246,788, the value of its other intangibles to be $1,839,221, and the value of its tangible assets employed in business within Massachusetts to be $7,682. The commissioner found that the fair value of the appellant's capital stock was $3,506,626 and that the value of the total assets was $4,187,748. He found that the value of all intangible assets was $3,086,009, including the stocks of subsidiaries, and that the value of tangible assets employed in business in Massachusetts was $7,682. In determining the value of the intangible assets employed in business within Massachusetts the commissioner followed Ruling 2505 of his Rules and Regulations, which provides: 'Ordinarily, such proportion of an intangible asset employed in business will be deemed to be employed in business within Massachusetts as that portion of the remainder of income allocable to Massachusetts under the provisions of section 41 of the law bears to the total of said remainder.' The proportion so determined under section 41 was .19233. Applying this proportion to the total value of intangible assets, $3,086,009, the commissioner found the value of intangible assets employed in business within Massachusetts to be $593,532. Adding the value of the tangible assets so employed, $7,682, he found the value of the assets, both real and personal, employed in business within the Commonwealth to be $601,214. Applying the rule provided by G.L. c. 63, § 30,

cl. 4, he found the proportion of the fair value of the capital stock which the value of the assets employed in business within the Commonwealth bore to the value of the total assets to be $503,429, from which he deducted the value of motor vehicles amounting to $964, leaving $502,465 as the corporate excess employed within the Commonwealth. If in determining the value of intangible assets employed within the Commonwealth the value of the shares of subsidiaries had been omitted, and the proportion .19233 had been applied to the remaining $1,839,221, of intangible assets, the value of intangible assets employed in business within the Commonwealth would have been $353,737, and the corporate excess within the Commonwealth would have been $301,671.

"Upon these facts the appellant makes two contentions;* first, that it is engaged exclusively in interstate commerce and so was not subject to the excise, and, secondly, that in any event there should not have been included in the assets employed in business within the Commonwealth any part of the stock of its subsidiaries.

"We find, for the reasons stated in the opinion below, that the business done by the appellant in Massachusetts was not exclusively interstate commerce, but that it did some local business as well. We find that the appellant's shares of stock in its subsidiaries were not employed in any business within the Commonwealth, and that a fair determination of the value of the intangible assets so employed would have been reached by applying the proportion obtained in accordance with the commissioner's ruling to the value of the remaining intangible assets. Accord-

*The Board here leaves out contentions of appellant with reference to constitutionality of the tax. See Contentions of Law 3, 4, 6, and 7 (Rec. p. 5); also discussion of jurisdiction of Board of Tax Appeals, *infra*, p. 6.

ingly we find that the amount of the corporate excess employed within the Commonwealth was $301,671. The amount of the excise which should have been assessed is therefore $1,508.36, and the appellant is entitled to an abatement of $1,003.97."

(c) *The Massachusetts Board of Tax Appeals.*

The Massachusetts Board of Tax Appeals functions as a Court of original jurisdiction. G.L. c. 58A, sec. 7 (App. pp. 34-35). *J. G. McCrory Co. of Massachusetts* v. *Commissioner,* 1 Mass. B.T.A. 273. The decision of the Board is final as to findings of fact, but an appeal as to matters of law may be taken to the Supreme Judicial Court. G.L. c. 58A, sec. 13 (App. pp. 35-38). The Court upon determination of the appeal may make such order as such determination may require, including an order for costs. G.L. c. 58A, sec. 13 (App. pp. 35-38). The Board seems to have doubt of its authority to declare an act of legislature unconstitutional. In one of its early cases, *New England Southern Corporation* v. *Lowell,* 1 Mass. B.T.A. 542, 552, this authority was commented on as follows:

> "Whether it would be its [the Board's] duty in any case to declare an act of the legislature unconstitutional may be open to discussion, but we are clear that every doubt as to the validity of a statute must be resolved in its favor by the Board."

(d) *Analysis and Computation of the Tax.*

The tax in issue was assessed under G.L. (Ter. Ed.) c. 63, secs. 39-43 (App. p. 41). This statute levies a tax on foreign corporations based on income derived from business carried on within Massachusetts and "corporate excess" employed within Massachusetts. G.L. (Ter. Ed.) c.

63, sec. 39 (App. p. 41). In this case the appellant had no net income (page 1 of tax return, Rec. p. 10A), so the tax in issue is based solely on the "corporate excess" employed within Massachusetts. "Corporate excess employed within the commonwealth" is defined as "such proportion of the fair value of its [the corporation's] capital stock on the last day of the taxable year as the value of its assets, both real and personal, employed in any business within the Commonwealth on that date, bears to the value of the total assets of the corporation on said date." G.L. (Ter. Ed.) c. 63, sec. 30 (4) (App. p. 38). The first step in the assessment of the tax is, therefore, to value the capital stock of the corporation. The next step is to determine the value of the assets of the corporation, both real and personal, employed in business within Massachusetts. The allocation of real estate and tangible personal property is, of course, based on its situs within and without Massachusetts. Intangible assets must, however, be allocated by some arbitrary means, and the statute does not provide any guide for this allocation. In the case at bar it was made pursuant to Ruling 2505 of the Commissioner's Rules and Regulations (Findings of Fact, Rec. p. 27, where Ruling 2505 is quoted at lines 26-32). This Ruling provides in effect that the allocation should be made on the same basis as the statute provides for the allocation of net income, and such allocation was held to be in conformity with the statute in *Alpha Portland Cement Co.* v. *Commonwealth*, 248 Mass. 156, 161. This allocation provided by the statute (G.L. c. 63, sec. 38, App. pp. 38-41) is based on three factors which are given equal weight in allocating the net income and hence the intangible assets employed in business within Massachusetts. The first factor is based on the value of the corporation's tangible personal property situated within Massachusetts. As the value of such property is assigned directly as assets employed in

business within Massachusetts, its inclusion in this allocation merely gives it additional weight in the final determination of the tax. In the case at bar the effect of this factor was insignificant, as the average value of tangible personal property of the appellant within Massachusetts, consisting of office furniture and salesmen's automobiles, was only $8734 as against an average value of total tangible personal property of $1,557,400 (Table A of Tax Return, Rec. p. 100) and a total value of all assets of $4,187,748 (Findings of Fact, Rec. p. 27).

Substantially the entire tax assessed to the appellant in this case is, therefore, based on the second and third factors, which allocate a substantial portion of the intangible assets of the appellant as assets employed in business within Massachusetts. The second factor is based on wages, salaries, and commissions paid employees which are assignable to Massachusetts. The statute provides that wages, salaries, and commissions assignable to Massachusetts shall be "such expenditure for the taxable year as represents the compensation of employees not chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the Commonwealth" (G.L. (Ter. Ed.) c. 63, sec. 38 (5), App. pp. 39-40). By its terms it includes commissions paid a salesman resident in Connecticut who solicits orders for carload lots of lumber to be shipped direct from South Carolina, providing such salesman reports to the Boston sales office. No attempt is made to restrict the compensation of employees assignable to Massachusetts to such compensation of employees as are engaged in any business alleged to be intrastate commerce.

The third factor is based on gross receipts from sales assignable to Massachusetts. The statute provides that the gross receipts from business assignable to Massachusetts "shall be the amount of gross receipts for the taxable

year from (*a*) sales, except those negotiated or effected in behalf of the corporation by agents or agencies chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the Commonwealth and sales otherwise determined by the Commissioner to be attributable to the business conducted on such premises'' (G.L. c. 63, sec. 38 (6), App. p. 40). By its terms it includes the sales of all lumber shipped into the New England States. These sales are all admittedly in interstate commerce (Opinion of Board of Tax Appeals, Rec. p. 29).

The computation of the allocating fraction on the basis of the foregoing three factors is shown in Table A, page 3 of the tax return filed by the appellant (Rec. p. 10C). This fraction was applied to total intangible assets of the appellant by the Commissioner to determine the portion employed in business in Massachusetts. The Board of Tax Appeals in computing the tax, however, reduced the total intangibles by the value of the stock of subsidiary corporations. Its computation, regardless of the intention of the statute, must have included a substantial portion, if not all, of the accounts receivable from customers in the New England States other than Massachusetts, as well as a substantial portion of the other intangible assets of the appellant. Having thus arbitrarily determined the intangible assets employed in Massachusetts, the tangible assets were added and the total became the value of assets employed in business in Massachusetts. This value became the numerator of a fraction whose denominator was the value of all assets, and this fraction was applied to the value of the capital stock of the appellant to determine the ''corporate excess'' employed in business within Massachusetts. This ''corporate excess'' was reduced by the value of salesmen's automobiles (taxed locally) and the tax of $5 per thousand was assessed on the balance.

As the computation of the tax is somewhat complicated and as the method is exactly the same as that in issue before this Court in *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U.S. 203, the following computation is here presented following the form used in the opinion in that case. The figures used have been taken from the copy of the tax return of the appellant (Table A, p. 3, Rec. p. 10C) and the Findings of Fact of the Board (Rec. pp. 27-28).

Amount of Tax Measured by Net Income

Average value of tangible property in Massachusetts, $8,734. Divide this by average value of all tangible property, $1,557,400; multiply resulting fraction by $56,347 (1/3 of $169,043, net loss for year)	= $	314.80
Wages, salaries, etc., assignable to Massachusetts, $92,899. Divide this by amount of all wages, salaries, etc., $209,640; multiply resulting fraction by $56,347 (1/3 of $169,043, *supra*)	=	24,970.00
Gross receipts assignable to Massachusetts, $278,551. Divide this by gross receipts from all business, $2,172,110; multiply resulting fraction by $56,347 (1/3 of $169,043, *supra*)		7,226.00
Net loss assignable to Massachusetts		$32,510.80
Total according to income		None

Amount of Tax Measured by Corporate Excess

Loss assignable to Massachusetts, as above shown, $32,510.80. Divide this by $169.043 (entire apportionable net loss); multiply resulting FRACTION* by $1,839,221 (used for

*Fraction of .19233 stated in Findings of Fact as being computed in accordance with provisions of section 41 (App. p. 41).

total intangible assets). This yields $353,737, which was taken as the value of intangible assets assignable to Massachusetts. The tangible assets, $7682, were added and $361,419 became the total accepted value of assets assignable to the state.

Cash value of the company's capital stock was fixed at $3,506,625; all assets, $4,187,748. Divide $361,419 by $4,187,748; multiply resulting fraction by $3,506,625; the result is $302,635. From this the value of motor vehicles in Massachusetts of $964 was deducted, leaving $301,671—the "corporate excess." Five dollars per thousand upon this is $1508.36.

Total assessment for 1932 $1508.36

The important deductions from the foregoing analysis and computation of the tax, which will be referred to in the argument, are that the yardstick used to measure the tax has made no attempt whatsoever to differentiate between interstate commerce and that which is alleged to be intrastate commerce; that the amount of tax exacted is increased directly by interstate commerce; and that the net result is the taxation of accounts receivable and other intangible assets of the appellant which are not within the jurisdiction of Massachusetts.

Specification of Errors.

1. The Supreme Judicial Court of the Commonwealth of Massachusetts erred in holding and deciding that the tax imposed by chapter 63 of the General Laws of the Commonwealth of Massachusetts was applicable to the appellant, by reason of which it has in effect held that said tax may be imposed on a foreign corporation engaged exclusively in interstate commerce within the Commonwealth of Massachusetts and that such construction would not be in violation of the Commerce Clause embodied in section 8 of article I of the Constitution of the United States.

2. The Supreme Judicial Court of the Commonwealth of Massachusetts erred in holding and deciding that the tax imposed by chapter 63 of the General Laws of the Commonwealth of Massachusetts was applicable to the appellant, by reason of which it has in effect held that said tax may be imposed on a foreign corporation engaged exclusively in interstate commerce within the Commonwealth of Massachusetts and that such construction would not be in violation of the 14th Amendment to the Constitution of the United States.

3. The Supreme Judicial Court of the Commonwealth of Massachusetts erred in holding and deciding that the method of allocating the intangible assets of the appellant adopted by the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts was a reasonable method of allocating the value of said intangible assets for the purpose of the tax imposed by chapter 63 of the General Laws of the Commonwealth of Massachusetts, by reason of which it has in effect held that said tax may be imposed on the interstate business of a foreign corporation and that such construction would not be in violation of the Commerce Clause embodied in section 8 of article I of the Constitution of the United States.

4. The Supreme Judicial Court of the Commonwealth of Massachusetts erred in holding and deciding that the method of allocating the intangible assets of the appellant adopted by the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts was a reasonable method of allocating the value of said intangible assets for the purpose of the tax imposed by chapter 63 of the General Laws of the Commonwealth of Massachusetts, by reason of which it has in effect held that the said tax may be imposed on property of a foreign corporation situated without the limits of the Commonwealth of Massachusetts and that such construction would not be in violation of the

14th Amendment to the Constitution of the United States.

5. In said suit there was drawn in question the validity of chapter 63 of the General Laws of the Commonwealth of Massachusetts on the ground that it was repugnant to the Constitution of the United States in that it levied a tax that is a direct burden on interstate commerce in contravention of the Commerce Clause embodied in section 8 of article I of the Constitution of the United States, and the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts was in favor of the validity of said statute, which decision is hereby assigned as error.

6. In said suit there was drawn in question the validity of chapter 63 on the ground that it was repugnant to the Constitution of the United States in that it levied a tax against property situated without the limits of the Commonwealth of Massachusetts in contravention of the 14th Amendment to the Constitution of the United States, and the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts was in favor of the validity of said statute which decision is hereby assigned as error.

Summary of Argument.

1. The appellant, to the extent which it was carrying on business in Massachusetts, was engaged exclusively in interstate commerce and was not subject to the excise imposed by chapter 63 of the General Laws of the Commonwealth of Massachusetts. The Supreme Judicial Court of the Commonwealth of Massachusetts erred in holding otherwise.

This issue is presented on account of the construction placed on the decision of this Court in *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U.S. 203, by the Supreme Judicial Court in *W. & J. Sloane* v. *Commonwealth*, 253 Mass. 529, 535. In the latter case the Supreme Judicial

Court held in effect that the Massachusetts Legislature could not have intended to enact a tax law which would be in violation of the United States Constitution and that the Supreme Judicial Court itself erred in construing the statute as applying to a foreign corporation engaged exclusively in interstate commerce in Massachusetts. The present state of the law in Massachusetts is, therefore, that the excise imposed by chapter 63 of the General Laws, regardless of its terms, does not apply to a foreign corporation engaged exclusively in interstate commerce within Massachusetts. The Supreme Judicial Court has held the appellant to be engaged in intrastate commerce within Massachusetts on the authority of *Cheney Bros. Co.* v. *Massachusetts,* 246 U.S. 147, notwithstanding the construction placed on the decision in that case by this Court in *Ozark Pipe Line Co.* v. *Monier,* 266 U.S. 555, 565-566. It is submitted that the case at bar is indistinguishable from *Ozark Pipe Line Co.* v. *Monier* (*supra*) and that the Supreme Judicial Court erred in holding the excise imposed by chapter 63 of the General Laws applied to the business of the appellant.

II. The imposition of the excise imposed by chapter 63 of the General Laws upon the appellant is in violation of the Constitution of the United States in that the appellant is denied the rights and privileges assured to it therein and in that the said excise so assessed against the appellant is a direct burden on interstate commerce and constitutes an unlawful regulation of interstate commerce in contravention of the Commerce Clause embodied in section 8 of article I of the Constitution of the United States. The Supreme Judicial Court erred in holding otherwise.

The tax in issue is a privilege tax laid directly on the operations of the business, and is not a tax laid upon a franchise emanating from the power of the state. If the

tax is not paid, an injunction may be obtained restraining the further prosecution of business by the corporation in Massachusetts.

Adopting, for the purpose of argument, the theory of the Massachusetts Supreme Judicial Court that the appellant was engaged in some local business, it does not follow that the tax imposed is valid. It must appear that a reasonable effort has been made to differentiate between state and interstate commerce and to tax only the former.

Looney v. *Crane Co.*, 245 U.S. 178.
Union Tank Line Co. v. *Wright*, 249 U.S. 275.
Underwood Typewriter Co. v. *Chamberlain*, 254 U.S. 113.
Hump Hairpin Co. v. *Emmerson*, 258 U.S. 290.
Alpha Portland Cement Co. v. *Massachusetts*, 268 U.S. 203.
Cooney v. *Mountain States Tel. & Tel. Co.*, 294 U.S. 384.

The amount of tax exacted must not be increased by the interstate business done.

Cooney v. *Mountain States Tel. & Tel. Co.*, 294 U.S. 384.

The apportionment of the tax base in the case at bar is clearly an attempt to tax interstate commerce under the guise of taxing intrastate business. No reasonable effort has been made to separate state from interstate business, and the amount of tax exacted increases directly with the amount of gross receipts from sales all admittedly made in interstate commerce.

III. The imposition of the tax imposed by chapter 63 of the General Laws upon the appellant is in violation of the Constitution of the United States in that it levies a tax

upon the property of the appellant situated without the limits of the Commonwealth of Massachusetts, thereby depriving the appellant of its property without due process of law, in contravention of the 14th Amendment to the Constitution of the United States. The Supreme Judicial Court erred in holding otherwise.

Although the tax has been construed as an excise tax (*Judson Freight Forwarding Co.* v. *Commonwealth*, 242 Mass. 47, 51; *Alpha Portland Cement Co.* v. *Commonwealth*, 244 Mass. 547, 548), where the corporation has no net income and the value of the corporate franchise is less than the book value of its assets after deducting liabilities, as in the case at bar, the tax is in substance a tax on the property of the corporation. Even if so construed, the tax is invalid, as the method of apportioning the assets does not purport to be an allocation of assets over which Massachusetts has jurisdiction to levy a property tax. The apportionment here results in the inclusion of accounts receivable due from residents of other states and a portion of the other intangible assets of the appellant. Such property is outside the jurisdiction of Massachusetts and is not subject to tax.

Union Tank Line Co. v. *Wright*, 249 U.S. 275, 282.

The tangible property situated within Massachusetts and any other property subject to the taxing jurisdiction of Massachusetts can be ascertained accurately. There is no need for a complicated allocation. The only reason an apportionment is ever allowed is to ascertain the real value of assets within the state.

Wallace v. *Hines*, 253 U.S. 66.

ARGUMENT.

I. The appellant, to the extent which it was carrying on business in Massachusetts, was engaged exclusively in interstate commerce and was not subject to the excise imposed by chapter 63 of the General Laws of the Commonwealth of Massachusetts. The Supreme Judicial Court of the Commonwealth of Massachusetts erred in holding otherwise.

The excise imposed by chapter 63 of the General Laws was held to be in violation of the Constitution of the United States by this Court when imposed on a foreign corporation admittedly engaged exclusively in interstate commerce within Massachusetts in *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U.S. 203. The effect given this decision in Massachusetts is stated by the Massachusetts Supreme Judicial Court in *W. & J. Sloane* v. *Commonwealth,* 253 Mass. 529, 533, as follows:

> "The decisions of this court in the Alpha Portland Cement Company cases in 244 Mass. 530, and 248 Mass. 156, were wrong in holding that the excise could be levied upon corporations doing exclusively an interstate business within the Commonwealth. Those decisions attempted to extend the excise statute into a field to which it was not applicable. The ground for those decisions was the view, then entertained but now held to be erroneous in 268 U.S. 203, that the statute so interpreted would not offend any provision of the Federal Constitution. It was said that the words of the statute as a matter of verbal construction were broad enough to include such corporations. But the principle was recognized that the intention ought not to be imputed to the Legislature to enact an unconstitutional statute, provided the statute could be con-

strued as applicable to matters within its constitutional power if that seemed in harmony with the general purpose of the Legislature."

The tax assessed to the appellant in this case was assessed under the same statute and by the same formula as was used in the Alpha Portland Cement Company case (Analysis and Computation of the Tax, *supra,* pp. 6-11). Therefore, if the appellant is held to be engaged exclusively in interstate commerce, that is the end of the case, as the excise imposed by chapter 63 does not apply. The Supreme Judicial Court has held that the appellant was not engaged exclusively in interstate commerce in Massachusetts and grounded its decision on the case of *Cheney Bros. Co.* v. *Massachusetts,* 246 U.S. 147. The reasons for this decision are stated in the opinion (Rec. p. 34) as follows:

"The principal office of the taxpayer was in Boston. Its most active bank account was there. Corporate books and records were kept there; the location of its treasurer with all its implications was there; the dividends were paid and the meetings of its directors were held there. These are corporate functions which are not interstate commerce. That this constituted local and intrastate business which subjected the foreign corporation to the excise tax of this Commonwealth seems to us to be settled by the decision in Cheney Brothers Co. v. Massachusetts, 246 U.S. 147."

The Supreme Judicial Court has here placed the same construction on the Cheney Brothers Company decision as was placed on it by District Judge Valkenburgh in *Ozark Pipe Line Co.* v. *Monier* (reversed in 266 U.S. 555), and in almost identical language. In his opinion (Transcripts of Records and File Copies of Briefs, vol. 35, Case No. 181, Rec. pp. 43-44) District Judge Valkenburgh said:

"The Attorney General in his brief fairly recites the nature of the business transacted by complainant in this state. For the sake of brevity I quote the language of the brief upon this point . . . 'The vice-president, secretary, treasurer and other officers maintain their offices and headquarters in their offices in St. Louis, where telephones are maintained and the name of the company appears on the doors of said offices. Stockholders and directors meetings are held there. All certificates for the receipt of oil for transportation are sent to the St. Louis office where the revenue for said transportation is figured and entered of record. The tariff rates are also kept there and in fact the entire business of the corporation is managed and directed from the Missouri office.

" 'This statement is not traversed and is not susceptible of contradiction in any substantial particular. . . . ' In my opinion, this case falls within the spirit, if not the letter, of the decision of the Supreme Court of the United States in the cases of Copper Range Co. and Champion Copper Co. reported in Cheney Brothers Company v. Commonwealth of Massachusetts, 246 U.S. 147 . . . In my opinion, that case is decisive of this controversy under the testimony produced at the hearing."

The error of this construction of the Cheney Brothers Company case was clearly pointed out in *Ozark Pipe Line Co.* v. *Monier,* 266 U.S. 555, 566, where, in reversing the decision of District Judge Valkenburgh, this Court said:

"The Court below grounded its decision chiefly upon *Cheney Bros. Co.* v. *Massachusetts,* 246 U.S. 147; but a review of that case will clearly demonstrate that it cannot be given the effect thus ascribed to it. Seven

foreign corporations sought to avoid a Massachusetts excise tax on the ground, among others, that, as imposed, it contravened the Commerce Clause of the Constitution. This court held the tax invalid as to one of the corporations and sustained it as to the other six. The first of the six kept a stock of machine parts in the state which were sold both within and without the state, and the court simply held that the portion of the business which was purely local was subject to local taxation. The second did an extensive local business in repairing cars of its own make and in selling secondhand cars. The third employed salesmen who took orders for its product from local retailers and turned them over to be filled by the nearest wholesaler, and this amounted, as the court said, simply to one local merchant buying from another. The fourth and fifth were mining companies operating mines in Michigan with offices in Boston where their directors met, declared and paid dividends, etc. Interstate commerce was not affected. Indeed, it does not affirmatively appear that there was any such commerce to be affected. . . . It will thus be seen that there is nothing in this decision upon which the decree under review can properly rest. Its effect is entirely the other way."

The Supreme Judicial Court has attempted to distinguish the case at bar from the Ozark Pipe Line Company case on the following facts (Rec. pp. 36-37):

"It does not appear that its directors' meetings were held in Missouri, that its treasurer was located there, or that its dividends were paid there. The court in its opinion stressed the fact that the corporate activities at the Missouri office of the corporation were solely in furtherance of interstate transportation of oil in the pipe line."

The opinion of the trial judge (*supra,* p. 19), however, shows that not only the directors' meetings but also the stockholders' meetings were held in Missouri and that the treasurer's office was located there. It does not appear affirmatively that dividends were paid in Missouri, but all the corporation's bank accounts were there and it seems fair to infer that dividends were paid from these bank accounts if paid at all. If the corporate functions employed within Missouri by the Ozark Pipe Line Company were solely in furtherance of interstate commerce, it would seem that the corporate functions of the appellant employed within Massachusetts were, *a fortiori,* in furtherance of interstate commerce. The corporate life of the Ozark Pipe Line Company was far more centered in Missouri than that of the appellant in Massachusetts. There does not seem to be any fundamental difference between the interstate transportation of oil and the interstate transportation of lumber.

In view of the similarity between the case at bar and the Ozark Pipe Line Company case, it does not seem necessary to review the former decisions of this Court with reference to what constitutes interstate commerce. All the business of the appellant, with the exception of the exercise of the corporate functions referred to by the Supreme Judicial Court (*supra,* p. 18), is admittedly interstate commerce. It is this interstate business which gave value to the "corporate excess" which has been taxed. It should be pointed out, also, that the taxing statute involved in the case of *Cheney Bros. Co.* v. *Massachusetts,* 246 U.S. 147, was radically different from that in the case at bar. There no attempt was made to allocate a taxable value to Massachusetts on the basis of interstate business. As this Court said in *Ozark Pipe Line Co.* v. *Monier,* 266 U.S. 555, 566: "Interstate Commerce was not affected. Indeed it does not ap-

pear affirmatively that there was any such commerce to be affected."

The opinion of the Supreme Judicial Court has quoted from a dissenting opinion by Justice Brandeis in the case of *Cudahy Packing Co.* v. *Hinkle,* 270 U.S. 460, 468, in support of its construction of *Cheney Bros. Co.* v. *Massachusetts,* 246 U.S. 147. It seems clear, however, that the comments of Justice Brandeis are directed to the portions of the Cheney Brothers Company decision referring to corporations which made sales from stocks of merchandise in Massachusetts, as the Cudahy Packing Company made such sales in the taxing state and its principal office was not located there. There is nothing in either opinion in the Cudahy Packing Company case which places any construction on the portions of the Cheney Brothers Company case dealing with the Champion Copper Company and the Copper Range Company which differs or conflicts with the construction in *Ozark Pipe Line Co.* v. *Monier,* 266 U.S. 555, quoted above. The questions involved were not in issue.

II. The imposition of the excise imposed by chapter 63 of the General Laws upon the appellant is in violation of the Constitution of the United States in that the appellant is denied the rights and privileges assured to it therein and in that the said excise so assessed against the appellant is a direct burden on interstate commerce and constitutes an unlawful regulation of interstate commerce in contravention of the Commerce Clause embodied in section 8 of article I of the Constitution of the United States. The Supreme Judicial Court erred in holding otherwise.

The tax in issue is a privilege tax laid directly on the operations of the business and is not a tax laid upon a fran-

chise emanating from the power of the state. It is defined in the opinion of the Massachusetts Supreme Judicial Court (Rec. pp. 34-35) as "an excise for the commodity or privilege of having a place for the transaction of intrastate business in Massachusetts with the protection of our laws and the financial, commercial and other advantages appertaining thereto." The only business of the appellant held to be intrastate business was (Rec. p. 35): "The principal office of the taxpayer was in Boston. Its most active bank account was there. Corporate books and records were kept there; the location of its treasurer with all its implications was there; the dividends were paid and the meetings of its directors were held there." It is therefore for the commodity or privilege of exercising these corporate functions that the tax is imposed in this case. If the tax is not paid, an injunction may be obtained restraining the further prosecution of business by the corporation within Massachusetts (G.L. (Ter. Ed.) c. 63, sec. 75, App. pp. 41-42).

Adopting, for the purpose of argument, the theory of the Supreme Judicial Court, that such functions constitute local business subject to the taxing jurisdiction of Massachusetts, it does not follow that the tax imposed on the appellant is valid. It must appear that a reasonable effort has been made to differentiate between state and interstate commerce and to tax only the former.

Looney v. *Crane Co.*, 245 U.S. 178.
Union Tank Line Co. v. *Wright*, 249 U.S. 275.
Underwood Typewriter Co. v. *Chamberlain*, 254 U.S. 113.
Hump Hairpin Co. v. *Emmerson*, 258 U.S. 290.
Alpha Portland Cement Co. v. *Massachusetts*, 268 U.S. 203.
Cooney v. *Mountain States Tel. & Tel. Co.*, 294 U.S. 384.

The amount of tax exacted must not be increased by the interstate business done.

Cooney v. *Mountain States Tel. & Tel. Co.*, 294 U.S. 384.

These limitations on the right of a state to tax a foreign corporation engaged in both interstate and foreign commerce are pointed out in *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U.S. 203, where, at page 218, this Court said:

> "It must now be regarded as settled that a State may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the Commerce Clause; and the Fourteenth Amendment does not permit taxation of property beyond the State's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax So far as the language of *Baltic Mining Co.* v. *Massachusetts*, 231 U.S. 68, 87, tends to support a different view, it conflicts with conclusions reached in later opinions, and is now definitely disapproved.
>
> "*Union Tank Line Co.* v. *Wright*, 249 U.S. 275, 282, *et seq.*, pointed out the limitations which must be observed when property used in interstate commerce is valued for purposes of taxation by a State. We there declined to follow the rule applied in *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18, 26, and held that determination of real value with fair accuracy is essential. Many methods adapted to that end have been accepted, but this does not tend to support an excise laid upon a foreign corporation on account of interstate transactions.

> "The local business of a foreign corporation may support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the State is taxed. *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113, approved such an excise measured by income reasonably attributed to intrastate business; but nothing there said was intended to modify well-established principles. It must be read with the essential facts in mind. Local business was a sufficient basis for the excise, and there was no taxation of interstate commerce or property beyond the State."

The rule for applying these former decisions to alleged similar cases is stated in *Ozark Pipe Line Co.* v. *Monier*, 266 U.S. 555, 562, as follows:

> "an extended review of the decisions of this court dealing with this phase of the subject is not necessary. All proceed from the same principles, but range themselves on one side or the other of the line as the facts do or do not demonstrate that the tax as a practical matter constitutes a burden on interstate commerce. The facts upon which these former decisions rest, therefore, must be borne in mind in applying them to other and alleged similar cases. If the business taxed is in fact separate local business, not so connected with interstate commerce as to render the tax a burden on such commerce, the tax is good."

In the case of *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U.S. 203, the same statute was in issue and the tax was computed by the same formula as in the case at bar. The facts stated in the opinion with reference to the business conducted by the Alpha Portland Cement Company in Massachusetts are almost identical with the findings of fact of the Board of Tax Appeals in this case, with the ex-

ception of the exercise of certain corporate functions by the appellant which are necessary for its existence as a corporation but which are not "business" in the sense of activities which produce or are expected to produce income or profit to the corporation. The exercise of the same functions by a foreign corporation, otherwise engaged exclusively in interstate commerce within the state, was held to be solely in furtherance of its interstate business and not subject to an excise tax in *Ozark Pipe Line Co.* v. *Monier*, 266 U.S. 555.

It would seem that these two decisions definitely disposed of the case at bar unless the method of apportioning the tax in this case is peculiarly adapted to separate the value of the exercise of such corporate functions from the interstate business of the appellant or the application of these decisions has been restricted by later decisions of this Court.

An examination of the basis of the tax, however, discloses that it is clearly an attempt to tax interstate commerce under the guise of taxing intrastate business. The appellant had no net income, so the tax on income is not at issue. The base of the tax is the "corporate excess." As has been pointed out (Analysis and Computation of the Tax, *supra*, pp. 6-11), the portion of the "corporate excess" assigned to Massachusetts is substantially all based on the apportionment of intangibles to Massachusetts in accordance with the statutory method for the allocation of net income. This method of allocating intangibles was held to be in conformity with the statute in *Alpha Portland Cement Co.* v. *Commonwealth*, 248 Mass. 156, 161. The mere fact that the method of allocation is the same as was used in that case, where the corporation was admittedly engaged exclusively in interstate commerce, seems to prove conclusively that it is directed toward measuring the commodity or privilege of maintaining an office by the appellant to be

used "as the headquarters for salesmen who solicit orders in Massachusetts and other New England States and in a part of New York State, and for carrying on correspondence and other business activities in connection with the receipt of orders and shipment of goods for that territory" (Findings of Fact, Rec. p. 26), and not toward measuring the commodity or privilege of exercising the corporate functions found by the Supreme Judicial Court to be the sole intrastate business of the appellant.

If the apportionment of the tax base is analyzed more closely, it will be found that the only two factors having any substantial effect on the tax are the gross receipts of the appellant from sales made in the New England States and a portion of New York State and the salaries, wages, and commissions paid to employees who are not employed by any other office of the appellant. The gross receipts from sales were found by the Board of Tax Appeals to have been all from interstate commerce (Rec. p. 29). Unquestionably a tax assessed directly on such receipts would be invalid. In the recent case of *Matson Navigation Co. et al.* v. *California* (No. 346, October Term, 1935, Opinion delivered March 2, 1936), this Court said: "our decisions demonstrate that a state tax on gross earnings derived from interstate commerce is a burden upon that commerce and repugnant to the Commerce Clause." It is submitted that the utilization of such earnings in apportioning any substantial part of the tax base is equally a burden on interstate commerce. The use of this factor also violates the test recently laid down in *Cooney* v. *Mountain States Telephone & Telegraph Co.*, 294 U.S. 384, in these words:

> "Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the inter-

> state business done, that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business."

It is clear from the computation of the tax (*supra*, pp. 6-11) that the amount of tax is increased substantially by apportioning a part of the "corporate excess" on the basis of interstate sales. It is also clear that the tax is not imposed solely on account of intrastate business, as interstate sales are not in any way a fair measure of the value of the commodity or privilege of exercising the corporate functions which have been held to be intrastate commerce. (The Supreme Judicial Court of Massachusetts apparently failed to recognize the effect of this factor of apportionment when it said: "The excise here assailed conforms to the test recently laid down in *Cooney* v. *Mountain States Telephone & Telegraph Co.*" (Rec. p. 38).)

The only other factor of apportionment having any substantial effect on the tax is that of wages, salaries, and commissions. Here undoubtedly a portion of the wages and salaries paid are attributable to the corporate functions which have been held to be intrastate commerce, but the statute does not limit the factor to such wages and salaries although the amount would be readily ascertainable with absolute accuracy. It includes commissions paid a resident of Connecticut for negotiating the sale of a carload of lumber, which is shipped direct from South Carolina, and commissions and wages paid all other employees engaged in interstate commerce. By the inclusion of such wages, salaries, and commissions this factor also violates the test laid down in *Cooney* v. *Mountain States Telephone & Telegraph Co.* (*supra*) for the same reasons as the factor of gross receipts.

The opinion of the Supreme Judicial Court does not attempt to justify the apportionment of the tax base as a reasonable effort to differentiate state from interstate commerce, such as was held valid in *Underwood Typewriter Co.* v. *Chamberlain,* 254 U.S. 113, and *Hump Hairpin Co.* v. *Emmerson,* 258 U.S. 290. This question is disposed of by stating (Rec. p. 37): "It [the tax] is based upon that proportion of its tangibles and intangibles deemed to be employed in this Commonwealth. The effect upon interstate commerce is at most incidental and remote." The case of *Virginia* v. *Imperial Coal Sales Co., Inc.,* 293 U.S. 15, is cited as authority for this conclusion. An examination of that case discloses that this Court was there concerned with an ad-valorem property tax on a domestic corporation. It was said, at page 19:

> "Respondent is a domestic corporation with its principal office in that State where the proceeds of its accounts receivable are collected and deposited in bank. Such credits and accounts are regarded as situated at the domicile of the creditor and that domicile establishes a basis for taxation"—

and, at page 20:

> "We are dealing, as we have said, with an ad valorem property tax, and not with a privilege tax. Respondent is not taxed upon the privilege of engaging in interstate commerce, and decisions cited by the state court are not opposite. Thus, in Ozark Pipe Line Corp. v. Monier, 266 U.S. 555, the tax was held to be bad as one imposed 'upon the privilege or right to do business' of a corporation engaged only in interstate commerce. *Id.,* p. 562. The same principle of protection was applied in *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U.S. 203, 216."

It is difficult to see how this decision can be given the effect ascribed to it by the Supreme Judicial Court.

An examination of the other recent decisions of this Court also fails to disclose any modification of the well-established principles stated in *Ozark Pipe Line Co.* v. *Monier,* 266 U.S. 555, and *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U.S. 203.

In *Hans Rees' Sons, Inc.,* v. *North Carolina,* 283 U.S. 123, a tax was held invalid because it did not make a reasonable effort to differentiate state from interstate commerce and tax only the former.

In *Angelo Chilean Nitrate Sales Corp.* v. *Alabama,* 288 U.S. 218, a state tax was held invalid when imposed on the franchise of a foreign corporation engaged exclusively in interstate commerce and based on the value of tangible property within the state. In a dissenting opinion, Justice Cardoza qualified the decision in *Ozark Pipe Line Co.* v. *Monier* by saying, at page 236: "The court did not hold that the tax would have been unlawful if laid upon a franchise emanating from the power of the State." This qualification would not affect the case at bar, however, as the tax is not a franchise tax (Rec. p. 34) and the appellant did not derive its franchise from Massachusetts. In the same dissenting opinion, at page 237, the tax in the statute under review in that case was distinguished from the tax involved in the case at bar in these words:

> "*Alpha Portland Cement Co.* v. *Massachusetts,* 268 Mass. 203, dealt with a statute of Massachusetts, different in form from this, and interpreted as one laid directly on the operations of the business."

In *Matson Navigation Co. et al.* v. *California* (No. 346, October Term, 1935, Opinion delivered March 2, 1936) it was held that a franchise tax imposed on a domestic corporation, where a portion of the tax base included net in-

come from interstate and foreign commerce attributable to the state granting such franchise, was valid. The corporation was engaged in both intrastate (other than maintaining a principal office, etc.) and interstate commerce, and it was carefully pointed out that it was the franchise granted by the state, including the right to be a corporation empowered to do business in corporate form in accordance with California law, which was being taxed.

III. The imposition of the tax imposed by chapter 63 of the General Laws upon the appellant is in violation of the Constitution of the United States in that it levies a tax upon the property of the appellant situated without the limits of the Commonwealth of Massachusetts, thereby depriving the appellant of its property without due process of law, in contravention of the 14th Amendment to the Constitution of the United States. The Supreme Judicial Court erred in holding otherwise.

The tax in issue has been consistently construed as an excise tax and not a property tax.

Judson Freight Forwarding Co. v. *Commonwealth,* 242 Mass. 47, 51.

W. & J. Sloane v. *Commonwealth,* 253 Mass. 529, 532.

Carlos Ruggles Lumber Co. v. *Commonwealth,* 261 Mass. 450, 452, 453.

Alpha Portland Cement Co. v. *Massachusetts,* 268 U.S. 203, 213-216.

In the case at bar, however, the corporation had no net income (Tax Return, Rec. p. 10A). The net book value of its assets after deducting its liabilities is greater than the total value placed on its corporate franchise (Tax Return, Rec. p. 10B, Table IV and Findings of Fact, Rec. p. 27).

The tax is, therefore, in substance a tax on property. The method of allocating the intangible assets of the appellant to Massachusetts has already been pointed out (Analysis and Computation of Tax, *supra*, pp. 6-11). The right to tax tangible property situated in Massachusetts and credits due from residents of Massachusetts is not involved. The method of allocation does not purport to allocate such credits. Its intention is clearly to allocate intangible assets on the basis of sales made in all the New England States and a portion of New York State, and two other factors which bear no relationship to credits due from Massachusetts residents. The basis of the allocation clearly shows that credits due from residents of the New England States, other than Massachusetts, and from residents of New York State have been included as property subject to tax.

The proposition that a state cannot tax property outside its jurisdiction will hardly be questioned. It is stated by this Court in *Union Tank Line Co.* v. *Wright*, 249 U.S. 275, 282, as follows: "A state may not tax property belonging to a foreign corporation which has never come within its borders—to do so under any formula would violate the due process clause of the fourteenth Amendment." The value of tangible property and credits due from residents of Massachusetts (which the Supreme Judicial Court asserts are subject to taxation in Massachusetts in *Alpha Portland Cement Co.* v. *Commonwealth*, 248 Mass. 156) may be ascertained with absolute accuracy. There is no need for a complicated apportionment. "The only reason an apportionment is ever allowed is to ascertain the real value of assets within the State" (*Wallace* v. *Hines*, 253 U.S. 66).

The Supreme Judicial Court states in its opinion (Rec. p. 38) that "The taxpayer cannot upon this record question the allocation made by the defendant," and cites its former decision in *Alpha Portland Cement Co.* v. *Commonwealth*, 248 Mass. 156. As the portion of the opinion in that case

dealing with the right of the Alpha Portland Cement Company to question the allocation was concerned with a procedural question not pertinent to appeals prosecuted before the Board of Tax Appeals, it is not quite clear what the Court means. The appellant concedes that it cannot attack the method of allocation as not being in conformity with the statute. The Supreme Judicial Court has already held that it is in conformity with the statute when applied to a corporation admittedly engaged exclusively in interstate commerce (*Alpha Portland Cement Co.* v. *Commonwealth,* 248 Mass. 156). Its determination of the legislative intent is final. The appellant does not concede, however, that there is any defect in the record which prevents it from attacking the allocation made by the Board of Tax Appeals, in revising the assessment made by the Commissioner, as the step in the determination of the tax which makes the tax invalid as a violation of the Due Process Clause of the 14th Amendment or as a direct burden on interstate commerce.

Wherefore, on account of the errors hereinbefore assigned, the appellant prays that the said order of the Supreme Judicial Court of the Commonwealth of Massachusetts dated the 3d day of December, 1935, in the above-entitled cause, in so far as it denies the abatement of the entire tax assessed to the appellant under chapter 63 of the General Laws of the Commonwealth of Massachusetts, be reversed and an order be entered in favor of this appellant.

Respectfully submitted,

ROBERT C. McKAY,
Attorney for Appellant.

APPENDIX.

Chapter 58A, General Laws (Ter. Ed.), as Amended by Acts 1933, c. 321 and c. 350.

Section 7. Any party taking an appeal to the board from a decision or determination of the commissioner or of a board of assessors, hereinafter referred to as the appellee, shall file a petition with the clerk of the board of tax appeals and serve upon said appellee in the manner provided in section nine a copy thereof. Where two or more parcels of real estate are included in one decision of a board of assessors, the board of tax appeals in its discretion may require that each parcel be the subject of a separate petition. The commissioner shall forthwith furnish a copy of each such petition served upon him to the attorney general. The petition upon such appeal shall set forth specifically the facts upon which the party taking an appeal, hereinafter called the appellant, relies, together with a statement of the contentions of law which the appellant desires to raise. The appellant shall state upon the petition the address to which service of any pleading, motion, order, notice or process in connection with the appeal can be made upon him. Within such time as the board by its rules may prescribe, the appellee shall file with the board an answer stating fully each finding of fact and ruling of law made with respect to the tax or determination in issue and denying or admitting each and every allegation of fact contained in the petition; except that, in an appeal under section sixty-four or sixty-five of chapter fifty-nine, if the appellee desires to raise no issue other than the question whether there has been an overvaluation of the property on which the tax appealed from was assessed, no answer need be filed. If no answer is filed in such a case, the allegation of overvaluation of such property shall be held to be denied and all other material facts alleged in the petition admitted. If an answer is filed

a copy shall be served upon the appellant, in the manner provided in section nine. The party taking the appeal shall at the time of filing the petition pay an entry fee of ten dollars for each appeal from a decision of the commissioner or, in the case of an appeal from a decision of a board of assessors, an entry fee equal to ten cents on each one thousand dollars of the assessed value of that portion of the real estate or personal property, or both, the tax on which is sought to be abated, except that the minimum entry fee shall be five dollars. The board shall not consider, unless equity and good conscience so require, any issue of fact or contention of law not specifically set out in the petition upon appeal or raised in the answer. At any time before the decision upon the appeal by the board or by the supreme judicial court on appeal under section thirteen, the appellee may abate the tax appealed from in whole or in part or change his or its determination.

SECTION 13. The board shall make a decision in each case heard by it and may make findings of fact and report thereon in writing. Except in cases heard under the informal procedure authorized by section seven A, the board shall make such findings and report thereon if so requested by either party within ten days of a decision without findings of fact. Such report may, in the discretion of the board, contain an opinion in writing, in addition to the findings of fact and decision. All reports, findings and opinions of the board and all evidence received by the board, including a transcript of any official report of the proceedings, shall be open to the inspection of the public; except that the originals of books, documents, records, models, diagrams and other exhibits introduced in evidence before the board may be withdrawn from the custody of the board in such manner and upon such terms as the board may in its discretion prescribe. The decision of the board shall be final as to

findings of fact. From any decision of the board upon an appeal from a decision or determination of the commissioner, or of a board of assessors, except decisions of the board under sections twenty-five and twenty-six of chapter sixty-five, an appeal as to matters of law may be taken to the supreme judicial court by either party to the proceedings before the board who has not waived such right of appeal. A claim of appeal shall be filed with the clerk of the board within twenty days after the date of the decision of the board, or within twenty days after the date of a report of findings of fact, if such report is made on request of a party after the decision; and within twenty days thereafter, or within such further time as the board may allow, the appealing party shall enter the appeal in said court, in the county where either party lives or has his usual place of business or in Suffolk county, and shall file with the clerk of said court a copy of the record before the board, shall serve by registered mail upon the adverse party a copy of the claim of appeal and a notice that he has entered said appeal and shall file an affidavit of such service with said clerk. The record in such an appeal shall include copies of the following:—the tax returns and lists, if any, filed by the taxpayer, so far as material to the controversy, the original assessment or other original determination in issue, so far as material, the application for abatement or other petition filed with the commissioner or with the board of assessors and the decision or determination thereon, the petition upon appeal to the board, the answer to the petition and other pleadings, if any, filed with the board, the report and findings of the board including any opinions filed, all requests for rulings of law and findings of fact and the disposition of each by the board, the claim of appeal to the supreme judicial court and such portion of any official report of the proceedings before the board as may be necessary for the consideration of any question of law raised

before the board, which it is alleged that the board has erroneously decided. Each claim of appeal shall set out separately and particularly each error of law asserted to have been made by the board, with precise references to the portions and particulars of the proceedings before the board in which it is alleged that error of law occurred. Upon the entry of the appeal it shall be heard and determined by the full court. Within ten days from the entry of the appeal in the supreme judicial court the appealing party shall give the clerk of said court an order in writing to print the record filed with him and the affidavit of service for transmission to the full court, and, thereupon, in the manner provided in the second paragraph of section one hundred and thirty-five of chapter two hundred and thirty-one for carrying questions of law to the full court, the expense shall be estimated, notified to and paid by the appealing party, said record shall be printed and, together with any original papers, transmitted to the full court, and said appeal shall be entered on the docket of the full court. The court shall not consider any issue of law which does not appear to have been raised in the proceedings before the board. The court upon determination of the appeal may make such order as such determination may require including an order for costs. Upon the entry of such order, with or without an order for costs, a copy thereof shall be transmitted by the clerk of said court to the clerk of said board. If the order grants an abatement of a tax assessed by the commissioner or by the board of assessors of a town and the tax has been paid, the amount abated with interest at the rate of six per cent per annum from the time when the tax was paid but, in case of a tax assessed under chapter sixty-two, not from a time earlier than October first of the year in which the return of income subject to said tax was required to be filed, and, if costs are ordered against the commissioner or against a board of assessors, the amount

thereof, shall be paid to the taxpayer by the state treasurer or by the town treasurer, as the case may be, and, if unpaid in the latter case, execution therefor may issue against the town as in actions at law. If costs are ordered against a taxpayer execution shall issue therefor. The appeal to the supreme judicial court under this section shall be the exclusive method of reviewing any action of the board, except action under sections twenty-five and twenty-six of chapter sixty-five. For want of prosecution of an appeal in accordance with the provisions of this section the board, or, if the appeal has been entered in the supreme judicial court, a justice of that court, may dismiss the appeal. Upon dismissal of an appeal the decision of the board shall thereupon have full force and effect.

CHAPTER 63, GENERAL LAWS (TER. ED.).

SECTION 30. . . .

4. "Corporate excess employed within the commonwealth" by a foreign corporation, except as hereinafter provided, [shall mean] such proportion of the fair value of its capital stock on the last day of the taxable year as defined in paragraph numbered six of this section, as the value of the assets, both real and personal, employed in any business within the commonwealth on that date, bears to the value of the total assets of the corporation on said date, less the value of the following on such date.

SECTION 38. . . .

2. If the corporation carries on any business outside the commonwealth, the said remainder shall be divided into three equal parts:

(*a*) Of one third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the value of the corporation's tangible property situated

within the commonwealth and whose denominator is the value of all the corporation's tangible property wherever situated.

(*b*) Of another third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the expenditure of the corporation for wages, salaries, commissions or other compensation to its employees, and assignable to this commonwealth as hereinafter provided, and whose denominator is the total expenditure of the corporation for wages, salaries, commissions or other compensation to all its employees.

(*c*) Of the remaining third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the amount of the corporation's gross receipts from business assignable to this commonwealth as hereinafter provided, and whose denominator is the amount of the corporation's gross receipts from all its business.

3. In a case where only two of the foregoing three rules are applicable, the said remainder of net income of the corporation shall be divided into two equal parts only, each of which shall be apportioned in accordance with one of the remaining two rules. If only one of the three rules is applicable, the part of the net income received from business carried on within the commonwealth shall be determined solely by that rule.

4. The value of the corporation's tangible property for the purposes of this section shall be the average value of such property during the taxable year.

5. The amount assignable to this commonwealth of expenditure of the corporation for wages, salaries, commissions or other compensation to its employees shall be such expenditure for the taxable year as represents the compensation of employees not chiefly situated at, connected

with or sent out from premises for the transaction of business owned or rented by the corporation outside the commonwealth.

6. The amount of the corporation's gross receipts from business assignable to this commonwealth shall be the amount of its gross receipts for the taxable year from (*a*) sales, except those negotiated or effected in behalf of the corporation by agents or agencies chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the commonwealth and sales otherwise determined by the commissioner to be attributable to the business conducted on such premises, (*b*) rentals or royalties from property situated, or from the use of patents, within the commonwealth; provided, that upon application by a corporation which owns or controls substantially all the capital stock of another corporation, or by the corporation so owned or controlled, the commissioner may impose the tax provided for by this chapter upon the income of the two corporations jointly in the same manner as though they were a single corporation, or may, in such other manner as he shall determine, equitably adjust the tax of the applying corporation.

7. If a corporation maintains an office, warehouse or other place of business in a state other than this commonwealth for the purpose of reducing its tax under this chapter, the commissioner shall, in determining the amount of its gross receipts from business assignable to this commonwealth, include therein the gross receipts from sales attributed by the corporation to the business conducted at such place of business in another state.

8. In the case of consolidated returns of net income, the commissioner shall allocate such income, so far as practicable, in accordance with the above rules.

9. A rule shall not be deemed to be inapplicable merely because all the tangible property or the expenditure of a

corporation for wages, salaries, commissions or other compensation, or the gross receipts of the corporation, are found to be situated, incurred, or received without the commonwealth.

SECTION 39. Except as otherwise provided herein, every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the commonwealth, an excise equal to the sum of the following, provided that every such corporation shall pay annually a total excise not less in amount than one twentieth of one per cent of such proportion of the fair value of its capital stock as the assets, both real and personal, employed in any business within the commonwealth on the day fixed for determination of the value of the corporate excess employed within the commonwealth bear to the total assets of the corporation employed in business on said date:

(1) An amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth. . . .

SECTION 41. . . .

If a foreign corporation carries on any business outside this commonwealth, the remainder of the net income shall be allocated as provided in paragraphs 2 to 9, inclusive, of section thirty-eight.

SECTION 75. In addition to the methods provided by sections seventy-two and seventy-three, taxes under this chapter may be collected by an information brought in the supreme judicial court by the attorney general at the relation of the commissioner. The court may issue an injunction upon such information, restraining the further prosecution of the business of the company, association or corporation until such taxes, with interest and costs thereon, have been paid; but no telegraph company accepting

the provisions of section fifty-two hundred and sixty-three of the Revised Statutes of the United States shall be enjoined from constructing, maintaining or operating a telegraph line over and along any of the military or post roads of the United States within this commonwealth.

FILE COPY

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In the

Supreme Court of the United States.

October Term, 1935.

No. 218

The Atlantic Lumber Company,

Appellant,

v.

Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts,

Appellee.

BRIEF OPPOSING MOTION TO DISMISS.

ROBERT C. McKAY,
Attorney for Appellant.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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In the

Supreme Court of the United States.

October Term, 1935.

No.

THE ATLANTIC LUMBER COMPANY,

APPELLANT,

v.

COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS,

APPELLEE.

BRIEF OPPOSING MOTION TO DISMISS.

Short Statement of the Case.

This is an appeal from an order of the Supreme Judicial Court of the Commonwealth of Massachusetts affirming a decision of the Massachusetts Board of Tax Appeals. The appellant is a Delaware corporation engaged in the business of dealing in lumber at wholesale. It carries on business in part within the Commonwealth of Massachusetts, but it is contended that such part of its business so carried on in Massachusetts is exclusively interstate commerce. The Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts assessed an excise tax to the appellant for the year 1932 under chapter 63 of

the General Laws of the Commonwealth of Massachusetts. This tax was paid by the appellant, and an application for abatement was seasonably filed pursuant to the provisions of said chapter 63. This application for abatement was denied and the appellant appealed to the Massachusetts Board of Tax Appeals pursuant to the provisions of chapter 58A of the General Laws of the Commonwealth of Massachusetts. In this appeal there was drawn in question the validity of chapter 63 of the General Laws of the Commonwealth of Massachusetts on the ground that it was repugnant to the Constitution of the United States and the decision was in favor of its validity. From this decision the appellant appealed to the Supreme Judicial Court of the Commonwealth of Massachusetts, assigning as error the conclusion of the Massachusetts Board of Tax Appeals that said chapter 63 was valid and not repugnant to the Constitution of the United States. The decision of the Supreme Judicial Court was also in favor of the validity of said chapter 63, and the appellant in this appeal has assigned such decision as error.

Argument.

I.

The statement of the appellee does not disclose any matter or ground making against the jurisdiction of this Court asserted by the appellant.

The sole ground advanced by the appellant in support of his motion to dismiss is that there is no merit in the appeal. It is submitted that this is not "any matter or ground making against the jurisdiction of this Court" under paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States.

II.

The Federal questions in this case are ones which require analysis and exposition for their decision.

The statement of the appellee supporting his motion to dismiss asserts that the single issue calling for determination is whether the appellant was carrying on a local business within the Commonwealth of Massachusetts, and that this question was decided by the case of *Cheney Bros.* v. *Massachusetts,* 246 U.S. 147. The appellant does contend that the business activities the Supreme Judicial Court of Massachusetts has held to be local business are purely incidental to its interstate business, but it also contends that chapter 63 of the General Laws of Massachusetts, as construed by the Supreme Judicial Court of Massachusetts and administered by the Commissioner of Corporations and Taxation, is invalid as placing a direct burden on interstate commerce and levying a tax on property situated without the limits of the Commonwealth of Massachusetts. These issues were both raised in the pleadings before the Massachusetts Board of Tax Appeals and in the assignment of errors to the Supreme Judicial Court. Both were decided adversely to the appellant by the Supreme Judicial Court, and are included in the assignment of errors in this appeal.

That the case of *Cheney Bros.* v. *Massachusetts,* 246 U.S. 147, and more particularly the portion of that decision dealing with the Copper Range Co. and the Champion Copper Co., cannot be given the effect ascribed to it by the Supreme Judicial Court and the appellee has been clearly pointed out in *Ozark Pipe Line Corp.* v. *Monier,* 266 U.S. 555, where, at pages 565 and 566, this Court said:

> "The Court below grounded its decision chiefly upon Cheney Bros. Co. v. Massachusetts, 246 U.S. 147; but a review of that case will clearly demonstrate that it

cannot be given the effect thus ascribed to it. Seven foreign corporations sought to avoid a Massachusetts excise tax on the ground, among others, that, as imposed, it contravened the Commerce Clause of the Constitution. This Court held the tax invalid as to one of the corporations and sustained it as to the other six. The first of the six kept a stock of machine parts in the State which were sold both within and without the State, and the Court simply held that the portion of the business which was purely local was subject to local taxation. The second did an extensive local business in repairing cars of its own make and in selling second-hand cars. The third employed salesmen who took orders for its product from local retailers and turned them over to be filled by the nearest wholesaler, and this amounted, as the court said, simply to one local merchant buying from another. The fourth and fifth were mining companies operating mines in Michigan with offices in Boston where their directors met, declared and paid dividends, etc. Interstate commerce was not affected. Indeed, it does not affirmatively appear that there was any such commerce to be affected. . . . It will thus be seen that there is nothing in this decision upon which the decree under review can properly rest. Its effect is entirely the other way."

The taxing statute involved in the case of *Cheney Bros.* v. *Massachusetts* was radically different from the statute in the case at bar. No attempt was made to allocate the value of the corporate franchise on the basis of interstate sales made by salesmen sent out from a Massachusetts office. Chapter 63 of the General Laws of the Commonwealth of Massachusetts, under which the tax in the case at bar was assessed, was before this Court in *Alpha Portland Cement Co.* v. *Commonwealth,* 268 U.S. 203. In

holding the tax invalid as a burden on interstate commerce, this Court, at page 218, said:

> "It must now be regarded as settled that a State may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the Commerce Clause; and the Fourteenth Amendment does not permit taxation of property beyond the State's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax."

The facts in the case of *Alpha Portland Cement Co.* v. *Commonwealth* and the case at bar are substantially identical except that in the Alpha Portland Cement Co. case the corporation was admittedly engaged exclusively in interstate commerce within Massachusetts. In the case at bar the Court has held that certain of the business activities of the appellant were not interstate commerce nor incidental to interstate commerce, which ruling has been assigned as error.

Wherefore your appellant submits that the motion to dismiss should be denied.

Respectfully submitted,

ROBERT C. McKAY,

Attorney for Appellant.

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Supreme Court of the United States.

October Term, 1935.

No. 715.

The Atlantic Lumber Company,

Appellant,

v.

Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts.

BRIEF FOR APPELLEE.

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Supreme Court of the United States.

October Term, 1935.

No. 715.

THE ATLANTIC LUMBER COMPANY, *Appellant*,

v.

COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR APPELLEE.

Statement of the Case.

This case is before this court on appeal from a final judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts entered on December 3, 1935, upholding the imposition of an excise tax for the year 1932, amounting to $1508.36, upon the appellant, a corporation organized under the laws of the State of Delaware, upon the ground that this foreign corporation was doing a local business in Massachusetts.

The jurisdiction of this court is invoked under the provisions of an act approved January 31, 1928, c. 14, §1, 45 Stat. 54, U.S.C.A. Title 28, §861a, as it is claimed that this is a case where relief could be heretofore obtained by a writ of error under Judicial Code, §237a, which was approved February 13, 1925, c. 229, §1, 43 Stat. 937.

The appellant contends that it is entitled to review as the final judgment of the State court upheld the validity of the

taxing statute of that State wherein the validity of the tax was drawn in question as being contrary to the provisions of the Constitution of the United States.

Facts.

The Atlantic Lumber Company, a Delaware corporation, is engaged in the wholesale lumber business, maintaining its principal office in Boston, Massachusetts (Rec. p. 25). This office serves as a headquarters for salesmen who solicit orders in all the New England States and in part of the State of New York, and is used in carrying on correspondence and other business activities incidental to the receipt of orders and to the shipment of lumber. Orders secured by the salesmen are accepted in the Boston office. The appellant keeps no stock of lumber in Massachusetts. It fills the orders received from its customers either from some mill outside of Massachusetts or from its distributing plant in Buffalo, New York. The shipments are always made in carload lots direct to its customers from either the mill or from the Buffalo yard. Payments for sales to New England customers are made at the Boston office. The only tangible property located in Massachusetts consists of the office furniture and equipment and the automobiles used by the salesmen (Rec. p. 26).

The appellant also maintains a sales office in Buffalo, New York. It keeps its bank deposits in Buffalo, Brooklyn, New York City, Toronto, Canada, and in Boston. The latter account is the most active and is the second largest in amount. It is from this account that the Boston salesmen are paid (Rec. p. 26).

The Atlantic Lumber Company owns all the stock, with the exception of a few shares, of (*a*) the Vestal Lumber & Manufacturing Company, which is engaged in cutting timber and manufacturing lumber in Tennessee, Georgia,

Arkansas and Louisiana; (*b*) the Consolidated Lumber Company, engaged in a similar business in South Carolina; and (*c*) the Clayton Timber Company, which owns timber lands in Louisiana. None of these companies does any business in Massachusetts. The total output of these three subsidiaries is purchased by the appellant, with the exception of a small amount of lumber sold by the Vestal Lumber Company in Tennessee. Each of these companies is indebted to the appellant (Rec. pp. 26, 27).

The Atlantic Lumber Company, however, keeps its corporate books and records in the Boston office, where the office of the treasurer is located and where its directors' meetings are held, and dividends are declared and paid out of its Boston bank account. The books of the Consolidated Lumber Company and also of the Clayton Lumber Company are kept by the appellant in Boston, and so are the certificates of stock owned by the appellant in these three subsidiaries (Rec. p. 27).

The State Board of Tax Appeals found "that the business done by the appellant in Massachusetts was not exclusively interstate commerce, but that it did some local business as well" (Rec. p. 28), and, after ruling that the value of the stock of the three subsidiaries owned by the appellant should not have been included in its assets in determining the value of the corporate excess, correspondingly changed the computation made by the appellee and thereby granted a partial abatement in the amount of $1003.97, but found that the appellant was subject to an excise tax in the amount of $1508.36 (Rec. p. 28). This decision was affirmed by the Supreme Judicial Court of Massachusetts in an opinion rendered September 16, 1935 (1935 Adv. Sh. 2053) (Rec. pp. 33-38), and, in accordance therewith, a final judgment was entered on December 3, 1935 (Rec. pp. 33, 39).

Statutes Involved.

The material statutes involved are General Laws of Massachusetts, Tercentenary Edition, chapter 63, sections 30, 39 to 43, inclusive, and are printed in the Appendix, *infra*, pp. 24-31.

Computation of the Tax.

A foreign corporation is required to pay annually, on account of the carrying on or doing of business in Massachusetts, an excise tax equal to the sum of a certain percentage of the corporate excess employed by it in the Commonwealth, together with a certain percentage of the net income attributable to business done in this State. "Every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the commonwealth, an excise equal to the sum of . . . five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth" and "two and one half per cent of its net income determined to be taxable in accordance with the provisions of this chapter" [G.L. (Ter. Ed.) c. 63, §39]. The corporate excess upon which the tax is based is defined as follows: "'Corporate excess employed within the commonwealth' by a foreign corporation, . . . such proportion of the fair value of its capital stock on the last day of the taxable year . . . as the value of the assets, both real and personal, employed in any business within the commonwealth on that date, bears to the value of the total assets of the corporation on said date" [G.L. (Ter. Ed.) c. 63, §30, cl. 4]. The value of the intangible assets employed in Massachusetts is determined by Rule 2505 of the Rules and Regulations of the appellee, which reads as follows: "Ordinarily, such proportion of an intangible asset employed in business will be deemed to be employed in business within Massachusetts as that portion

of the remainder of income allocable to Massachusetts under the provisions of section 41 of the law bears to the total of said remainder. If, however, because of the peculiar circumstances of any particular case such method of apportionment does not fairly reflect the proportion of an asset employed in business in Massachusetts, the corporation may submit its reasons for requesting determination by another method. The Commissioner also reserves the right in such cases to make the apportionment by another rule, even though the corporation does not request determination by another method; but in such event the corporation will be notified."

The appellee found that there was not any income derived from the business conducted by the appellant in Massachusetts, and, consequently, no part of the excise assessed was based upon such income. The tax was, therefore, based entirely upon the corporate excess.

In the course of its opinion the Supreme Judicial Court of Massachusetts stated: "No contention is made that in these particulars the statutory provisions were not followed or that the calculations were not correct" (1935 Adv. Sh. 2053, 2054) (Rec. p. 34). In other words, we do not understand that, if the appellant was liable to an excise tax, it contends that the manner or method of its calculation or the amount thereof was erroneous.

Questions Presented.

The appellant contends that it was engaged exclusively in interstate commerce, and that the tax constituted a direct burden upon interstate commerce in contravention of the commerce clause (U.S. Const. art. I, §8) and deprives it of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States. The appellee concedes that the ap-

pellant was engaged in interstate commerce, but claims that it also conducted a local or intrastate business warranting the exaction of an excise.

Nature of the Tax.

The original statute imposing upon foreign corporations an excise tax measured by the percentage of its corporate excess, which was such proportion of the value of its authorized capital stock as the assets employed in the business in Massachusetts bore to the total assets of the corporation, and also a percentage of its net income derived from business conducted in Massachusetts, was enacted in 1919. See St. 1919, c. 355, §§14-22. The statute in question has been construed by the Supreme Judicial Court of Massachusetts as "an excise for the commodity or privilege of having a place of business in Massachusetts with the protection of our laws and the financial, commercial and other advantages appertaining thereto . . . If the foreign corporation can be subjected to an excise tax in respect to its business within this Commonwealth, this appears to be a fair and practicable method of calculating the excise."

Judson Freight Forwarding Co. v. *Commonwealth,* 242 Mass. 47, 51, 53.

In upholding an excise tax imposed upon a domestic corporation engaged in the wholesale lumber business, which purchased lumber in various States and sold it in various other States, the lumber in no instance being bought and sold in the same State, the lumber company claiming that it had no stock of lumber in Massachusetts and that it was engaged exclusively in interstate commerce, the court said that the excise "is not a tax on tangible property. It is not an income tax. It is an excise tax on the 'carrying

on or doing of business' by the petitioner. . . . It is manifest that the petitioner during the year in question was 'carrying on' and 'doing business' in this Commonwealth which was not interstate in its nature. Its main office and principal place of business were here. Its 'corporate functions' were carried on here. This descriptive phrase must include as matter of fair interpretation the holding of meetings of directors and of stockholders, the declaration of dividends, the maintenance of essential corporate offices such as those of the president, treasurer and secretary, the making of corporate records, the keeping of the books of the treasurer and whatever else may be necessary for the continuance of corporate existence. The dividends were distributed in this Commonwealth. The petitioner deposited money in banks here and received interest on the same. With respect to precisely similar facts except that foreign corporations were involved instead of a domestic corporation it was said in *Cheney Brothers Co.* v. *Massachusetts,* 246 U.S. 147, at page 155 (affirming *Copper Range Co.* v. *Commonwealth,* and *Champion Copper Co.* v. *Commonwealth,* 218 Mass. 558, 576-579): 'The exaction of a tax for the exercise of such corporate faculties is within the power of the State. Interstate commerce is not affected'; and at page 156: 'These corporate activities in Massachusetts are not interstate commerce and may be made the basis of an excise tax by that State.' The circumstance that those words were used touching foreign rather than domestic corporations is immaterial in its bearing on the issues here raised. Although those cases arose under an earlier tax law, the exact question involved was the same as one here presented, namely, whether the activities described constituted a doing of business within this Commonwealth not interstate in nature. Thus it is settled by authoritative adjudication that the contention of the petitioner to the effect that it is not subject to any excise

because its business is exclusively interstate in nature cannot be supported. The petitioner was doing some business in this Commonwealth which was not interstate commerce."

Carlos Ruggles Lumber Co. v. *Commonwealth,* 261 Mass. 450, 453, 454.

In the present case the Supreme Judicial Court, in its opinion, stated: "The true character of the tax thus authorized now is settled. It is confined solely to foreign corporations doing intrastate business within the Commonwealth. It does not apply to those engaged exclusively in interstate commerce. It is not a franchise tax on the right to exist as a corporation. It is not a tax on tangible or other property.

"It is not an income tax. It is measured by property and net income fairly attributable to the business done within the Commonwealth. It is an excise for the commodity or privilege of having a place for the transaction of intrastate business in Massachusetts with the protection of our laws and the financial, commercial and other advantages appertaining thereto."

Atlantic Lumber Co. v. *Commissioner of Corporations and Taxation,* 1935 Adv. Sh. 2053, 2055 (Rec. pp. 34, 35).

A similar interpretation of the statute defining the nature of the tax levied thereunder was adopted by this court in *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U.S. 203, 216.

It is, therefore, apparent that the taxing statute measures the excise imposed upon foreign corporations entirely by the property and net income fairly allocable to the business done within the State.

The Appellant was Not Engaged Exclusively in Interstate Commerce.

It is now settled that an excise based upon the property and net income of a foreign corporation attributable to the business done within a State cannot be levied if the corporation does only an interstate business.

Alpha Portland Cement Co. v. *Massachusetts,* 268 U.S. 203.
Ozark Pipe Line Co. v. *Monier,* 266 U.S. 555.

That principle has been recognized by the Massachusetts Supreme Judicial Court since the decision in the Alpha Portland Cement case, and the statute in question has ever since been held applicable only in cases where an excise was attempted to be laid on a corporation not exclusively engaged in interstate commerce.

W. & J. Sloane Co. v. *Commonwealth,* 253 Mass. 529, 535.

That the State court had the correct governing principle in mind is shown by the statement that "It [the tax] does not apply to those engaged exclusively in interstate commerce." *Atlantic Lumber Co.* v. *Commissioner of Corporations and Taxation,* 1935 Adv. Sh. 2053, 2055 (Rec. p. 34). Consequently, the State court would not have affirmed the decision of the Board of Tax Appeals unless it was found as a fact that the appellant had a local or intrastate business in Massachusetts. The nature of the appellant's business was considered from the viewpoint of interstate commerce. The exercise, however, of certain corporate functions, such as maintaining its principal office in Boston, where the treasurer was located, and where the corporate records and books were kept, and where meetings of the directors were held and dividends declared, payable

out of the Boston bank account, was held to be local or intrastate business and rightfully subjected to the excise. The decision was put squarely upon the ground that the performance of such corporate activities was not interstate commerce.

The appellee contends that the case at bar comes within the recent cases of *Copper Range Co.* and *Champion Copper Co.,* included in the case of *Cheney Brothers Co.* v. *Massachusetts,* 246 U.S. 147. A group of seven foreign corporations challenged the validity of an excise imposed upon them by St. 1909, c. 490, pt. III, §56, which provided for the payment by a foreign corporation of an excise of one fiftieth of one per cent of the authorized capital stock, but not in an amount exceeding two thousand dollars. The tax was upheld in every instance save that of Cheney Brothers Co. The facts in two of the cases above mentioned are, we submit, indistinguishable from the salient facts in the case at bar. As to those two cases the opinion of this court was as follows:

"Copper Range Company

> This is a Michigan corporation whose articles of association contemplate that it shall have an office in Boston. It is a holding company and owns various corporate stocks and bonds and certain mineral lands in Michigan. Its activities in Massachusetts consist in holding stockholders' and directors' meetings, keeping corporate records and financial books of account, receiving monthly dividends from its holdings of stock, depositing the money in Boston banks and paying the same out, less salaries and expenses, as dividends to its stockholders three or four times a year. The exaction of a tax for the exercise of such corporate faculties is within the power of the State. Interstate commerce is not affected.

CHAMPION COPPER COMPANY

This is another Michigan corporation which maintains an office in Boston pursuant to a provision in its articles of association. It deposits the proceeds of its mining and smelting business in Michigan in Boston banks and, after paying salaries and expenses, distributes the balance in dividends from its Boston office. The management of its mine is under the control of a general manager in Michigan and he in turn is under the control of the company's directors. The meetings of the latter, which occur several times in a year, are held in the Boston office. At these meetings the directors receive reports from the treasurer and general manager, vote dividends, elect officers, and authorize the execution of deeds and the like for lands in Michigan. These corporate activities in Massachusetts are not interstate commerce and may be made the basis of an excise tax by that State."

The appellant relies upon the case of *Ozark Pipe Line Co.* v. *Monier*, 266 U.S. 555. A Missouri statute providing for a franchise tax upon the privilege of doing business was held not to apply to a Maryland corporation which owned and maintained a pipe line conducting crude petroleum from Oklahoma through Missouri to Illinois, although the company maintained its principal office in Missouri, "where it keeps its books and bank accounts and from which it pays its employees within and without the State, purchases supplies, employs labor, maintains telephone and telegraph lines, enters into contracts for transportation of crude oil, and carries on various other activities connected with and in furtherance of its pipe line operations. Along the pipe line in Missouri there are three pumping stations the sole use of which is to accelerate the passage of the oil through the line. It owns and operates

passenger and truck automobiles, but these as well as its other property in Missouri are used exclusively in the prosecution of its interstate business" (pp. 560, 561). The operation of such a pipe line was interstate commerce and beyond the taxing power of the State. It was found that all its activities within the State of Missouri were inherently connected with its interstate business, and were the means by which such business was conducted and maintained. This court held that all that was done in Missouri was in furtherance of the transportation of oil from Oklahoma through Missouri to Illinois.

The employees and the facilities of the Ozark Company were ordinarily employed in the passage of oil in the pipe line which was physically located in Missouri. Apparently everything that the company did in Missouri was inseparably connected with the transportation of crude petroleum. Furthermore, the work and supervision done by the employees was necessary and indispensable to the operation of the pipe line. That work was required to be done in the State of Missouri, where the pipe line was conducted and in operation. The nature of the business fixed the locus of the corporate activities. They could not be performed in any other State.

In the present case the appellant had no lumber yard or supplies in Massachusetts and the business of its three subsidiaries was conducted in the Southern States. It was entirely optional as to where it should locate its principal office and corporate headquarters. It apparently selected Massachusetts because it thought that location would be advantageous. A tax upon its corporate activities in Massachusetts was no more a direct burden upon its interstate commerce than was such a tax upon the Copper Range Company and the Champion Copper Company, Michigan mining companies whose principal office was maintained in Massachusetts. The imposition by Massa-

chusetts of an excise tax upon these two last-mentioned mining companies was upheld by this court in *Cheney Brothers Co.* v. *Massachusetts,* 246 U.S. 147, and that decision has not been overruled.

In *Cudahy Packing Co.* v. *Hinkle,* 278 U.S. 460, 468, a subsequent decision, in referring to the Ozark case, it was stated in the dissenting opinion that "That decision was made by a unanimous Court after much deliberation. It has never been disapproved." In another dissenting opinion, referring to the Ozark case, it was said: "Nothing was done in Missouri, or so the court interpreted the evidence, except in furtherance of transportation."

Anglo-Chilean Corp. v. *Alabama,* 288 U.S. 218, 236.

The appellant owns all the stock except a few shares of these three subsidiaries, the business of two of which is the cutting of timber and the manufacture of lumber in the Southern States, and of the third, simply the ownership of timber lands in Louisiana. The books of these three subsidiaries are kept in Boston. The appellant not only supervises and controls their operation, but renders financial support to all of them when funds are necessary, and all are largely indebted to the appellant. All the lumber, with the exception of a small amount which is produced by these three subsidiaries, is purchased by them from the appellant. The ownership, control and supervision of these three subsidiaries, conducting a business of the kind and character done by the appellant in Boston, could be found to be in no way connected with its interstate business. It was a local business conducted in Massachusetts by the appellant for profit. It was evidently in the interest of the appellant to finance and control these three subsidiaries in order to be assured of a supply of lumber. There was no activity whatever of this kind and character pre-

sented in the Ozark case, and, under the decisions in Massachusetts, the activity of the appellant relative to these three subsidiaries constituted the doing of business in Massachusetts.

The maintenance by a foreign corporation engaged in the mining business in Arizona of a Massachusetts office which was used by the vice-president and treasurer, from which the checks drawn on its Boston account were issued to its creditors or in payment of its dividends, and where the general books of account were kept, constituted the doing of business in Massachusetts and supported the imposition of an excise tax. "These are corporate functions which are local in their nature. They are not interstate or foreign commerce. They are activities of the corporation which have no direct relation to interstate or foreign commerce and can be conducted at the particular place selected by the corporation. They are quite independent of the character or extent of its interstate or foreign commerce and of the States or nations between which that may move and be carried on."

Old Dominion Co. v. *Commonwealth,* 237 Mass. 269, 277, 278.

Springdale Finishing Co. v. *Commonwealth,* 242 Mass. 37.

Queens Run Refractories Co. v. *Commonwealth,* 270 Mass. 19.

See *Edwards* v. *Chile Copper Co.,* 270 U.S. 452, 455.

Both the Board of Tax Appeals and the Supreme Judicial Court of Massachusetts found that the appellant was engaged in a local business in Massachusetts in addition to the interstate business conducted by it (Rec. pp. 29, 30, 35).

The Appellant was Not Deprived of its Property without Due Process of Law.

The appellant contends that certain property owned by it outside the State was taxed.

In the first place, it is important to note that no tax was imposed upon any net income of the appellant. There was none from the business conducted in Massachusetts. Even if there were such an income, a tax based thereon would not be invalid even if the income was derived entirely from interstate commerce.

> *U.S. Glue Co.* v. *Oak Creek,* 247 U.S. 321, 324.
> *Edelman* v. *Boeing Air Transport, Inc.,* 289 U.S. 249.

In the next place, no tax was laid upon the gross receipts of the business.

> *Crew Levick Co.* v. *Pennsylvania,* 245 U.S. 292.
> *Cudahy Packing Co.* v. *Minnesota,* 246 U.S. 450.

The tax in the present case was based entirely upon that proportion of its issued capital stock that the assets employed in a local business in Massachusetts bore to the total assets of the company. In other words, the tax was measured by the corporate excess as defined in G.L. (Ter. Ed.) c. 63, §30, cl. 4. "The corporate excess employed within this Commonwealth was determined by the defendant and the excise calculated on it was paid by the taxpayer. No contention is made that in these particulars the statutory provisions were not followed or that the calculations were not correct"

> *Atlantic Lumber Co.* v. *Commissioner of Corporations and Taxation,* 1935 Adv. Sh. 2053, 2054 (Rec. p. 34).

Furthermore, the taxpayer does not point out any property outside the Commonwealth which has been taxed. The appropriate percentage of the value of the capital stock as showing what was employed in doing business in Massachusetts was used as a measure to determine the excise. No portion of the capital stock was made the subject of the tax.

"The taxpayer cannot upon this record question the allocation made by the defendant. *Alpha Portland Cement Co.* v. *Commonwealth*, 248 Mass. 156."

> *Atlantic Lumber Co.* v. *Commissioner of Corporations and Taxation*, 1935 Adv. Sh. 2053, 2059 (Rec. p. 38).

But even if it were open to the appellant to show that the percentage of its assets found to be employed in the business of the corporation within the Commonwealth was inequitable or excessive, yet there is no evidence upon the record to support such a contention. The total intangible assets of the appellant as shown by its return amounted to $1,839,221 (Rec. p. 19, Table 10C), and the allocating percentage as shown by the said return (Table 10C) was shown to be .19233%, which showed that the value of the appellant's intangible assets attributable to business conducted by it in Massachusetts amounted to $353,737 (Rec. p. 28). The tangible assets of the appellant, as shown by its return, amounted to $7682 (Rec. p. 10, Table 10C). Thus the total value of its tangible and intangible assets used in the conduct of its Massachusetts business was determined to be $361,419. The proportion that $361,419 bore to $4,187,748, which was the value of all the assets, multiplied by $3,506,626, which was the cash value of the company's capital stock, shows that the corporate excess in Massachusetts was $302,335, from which should be deducted

$964, the value of its automobiles in Massachusetts, leaving the corporate excess as $301,671, upon which the tax of $5 a thousand was imposed, or a total excise tax of $1508.36 (Rec. p. 28).

The computation of the tax as set forth in the appellant's brief, both as to net income and the determination of the corporate excess, is correct.

It may be difficult to determine with mathematical accuracy the exact portion of the company's property employed in doing business in any one State where the company conducts business in various States, yet, unless it appears that the real aim of the taxing statute is to fix an unreasonable, arbitrary figure, or that the apparent object is to reach something not taxable, then the determination of the tax should be upheld.

Hans Rees' Sons v. *North Carolina*, 283 U.S. 123, 135.

Macallen Co. v. *Massachusetts*, 279 U.S. 620, 629.

Where less than four per cent of the net profits from its sales was derived from sales made in Connecticut, in which State all the manufacturing of the company was done, a tax of forty-seven per cent of its net income was not disturbed. "The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sale in other States. In this it was typical of a large part of the manufacturing business conducted in the State. The legislature in attempting to put upon this business its fair share of the burden of taxation was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It, therefore, adopted a method of apportionment which, for all that appears in

this record, reached, and was meant to reach, only the profits earned within the state."

Underwood Typewriter Co. v. *Chamberlain,* 254 U.S. 113, 120, 121.

A California statute laid a franchise tax at the rate of four per cent on the income derived from business done within that State by corporations doing both a local and interstate business. A steamship company made a return showing an income of $730,357.18 from its intrastate business, and one of $2,526,148.22 from its interstate and foreign business. The Tax Commissioner determined that 22.2% of its income from interstate and foreign commerce was attributable to California, and included this amount in the tax assessed against the company. This court upheld such a tax and decided that it did not burden interstate commerce and did not, by taxing property outside the State, deprive the taxpayer of property without due process of law.

Matson Navigation Co. v. *State Board of Equalization of California,* No. 346, October Term, 1935, opinion rendered March 2, 1936.

The Tax does Not Contravene the Commerce Clause.

An excise may be constitutionally laid by a State upon the intrastate business of a foreign corporation engaged within that State in both interstate and intrastate business unless, as a practical matter, the tax imposes a direct burden upon interstate commerce, or, if the burden thus imposed is indirect, but is of such a nature as to obstruct or discriminate against such commerce.

Champlain Realty Co. v. *Brattleboro,* 260 U.S. 366.

Eureka Pipe Line Co. v. *Hallanan,* 257 U.S. 265.

The intangible property of a foreign corporation engaged only in interstate commerce may be subject to a property tax on such intangibles by the State in which they are located, although it has no real or tangible personal property in that State.

Virginia v. *Imperial Coal Co.*, 293 U.S. 15.

A tax, however, laid upon the gross receipts derived from interstate commerce has been held to be a burden and contrary to the commerce clause of the Federal Constitution.

Crew Levick Co. v. *Pennsylvania*, 245 U.S. 292.
Philadelphia S.S. Co. v. *Pennsylvania*, 122 U.S. 326.
Galveston H. & S.A. Ry. Co. v. *Texas*, 210 U.S. 217.
Oklahoma v. *Wells, Fargo & Co.*, 223 U.S. 298.
New Jersey Bell Tel. Co. v. *State Board of Taxes*, 280 U.S. 338.

A tax may be laid by a State upon the property employed in conducting an interstate business or upon the net income earned by such business.

Old Dominion S.S. Co. v. *Virginia*, 198 U.S. 299.
U.S. Glue Co. v. *Oak Creek*, 247 U.S. 321.
Shaffer v. *Carter*, 252 U.S. 37.
Atlantic Coast Line v. *Daughton*, 262 U.S. 413.

The Massachusetts excise tax is imposed "with respect to the carrying on or doing of business," and can only be laid when in fact the corporation has been engaged in doing a business in this State other than interstate business during the taxable year. This tax is measured by that portion of the value of the corporate assets which (less deductions of real estate and machinery) such value of the

assets employed in Massachusetts bears to the total value of all its assets and is also measured by the net income earned within the State.

In the case at bar, there being no net income, no tax was based thereon. The tax, therefore, was laid entirely upon the portion of the company's assets found to have been used in carrying on and doing business in Massachusetts. Standards similar to those employed in the present case in computing an excise tax upon foreign corporations engaged in both a local and interstate business and proportioned to the business done and the property owned within the State have been upheld. A tax so based is not in contravention of the commerce clause even though a part of the property or capital in computing the tax is used or derived from interstate commerce.

Hump Hairpin Co. v. *Emmerson*, 258 U.S. 290.
Pullman Co. v. *Richardson*, 261 U.S. 330.
International Shoe Co. v. *Shartel*, 279 U.S. 429.
Western Cartridge Co. v. *Emmerson*, 281 U.S. 511.
Matson Navigation Co. v. *State Board of Equalization of California*, No. 346, October Term, 1935, opinion rendered March 2, 1936.

Conclusion.

The tax in question is an excise tax imposed in the absence of net income with respect to the carrying on or doing of business within the Commonwealth. It is not an occupation tax, but is based upon the privilege of doing a local business in corporate form, and concretely upon the privilege of doing such a business with a principal office in Massachusetts where all the activities of its corporate existence are performed and effective. In fact, its principal office is not only used by the appellant in the conduct of its own business, but

it is apparently the corporate headquarters of the three subsidiary companies which are owned, financed and controlled by the appellant. The tax is apportioned to the property and business done in Massachusetts, and so is not a direct burden upon interstate commerce and does not tax property beyond the jurisdiction of the taxing power. The Tax Commissioner, the Board of Tax Appeals and the Supreme Judicial Court of Massachusetts have all found that the appellant did a local business in addition to its interstate business. The Board of Tax Appeals and the Supreme Judicial Court found that the capital stock of the three subsidiaries owned by the appellant was not employed in business in Massachusetts, and corrected the computation made by the appellee by eliminating therefrom the shares of the appellant in these subsidiary companies, and consequently ordered an abatement to that extent, and also held that the rest of the computation was correct, and affirmed the tax in the amount of $1508.36, which the record shows was based entirely upon the corporate excess, which was computed and assessed according to the statute [G.L. (Ter. Ed.), c. 63, § 30, cl. 4].

The present taxing system has been in effect in Massachusetts since 1919 and has been referred to by the Supreme Judicial Court as an attempt "to adopt a general principle whereby domestic and foreign corporations shall be treated with fairness on the same footing as to taxation. . . . The general scheme of this tax law is that an excise is levied on both domestic and foreign business corporations doing business in this Commonwealth. Real estate and machinery used in manufacture by such corporations alone are subject to a local property tax in the city or town where situated. All other personal property, whether tangible or intangible, is exempt from direct or local taxation. . . . The statute is an attempt to measure the excise on foreign corporations solely by the property and net income fairly attributable to the business done within this

Commonwealth. This excise tax is in place of any other tax on personal property within the Commonwealth from which, except as to machinery used in manufacture or in supplying and distributing water, foreign corporations (and also domestic corporations) are expressly exempted by G.L. c. 59, §5, cl. 16. Comparison of the sections of the tax act relating to the taxation of domestic corporations with those relating to foreign corporations shows that the same general definitions, exemptions and principles are followed as to both, except as the inherent differences as to domicil and as to allocation of residue of net income and of corporate excess require dissimilar provisions."

Alpha Portland Cement Co. v. *Commonwealth,* 244 Mass. 530, 544, 546.

If the excess herein imposed upon the appellant is invalid, then this foreign corporation escapes all taxation in Massachusetts even on its personal tangible assets. The tax law is meant to deal on the basis of equality between foreign and domestic corporations, and a domestic corporation engaged in a local business would have to pay an excise tax. The statutory system is meant to be non-discriminatory, and the amount of the present excise laid upon the appellant is trifling as compared to its capital stock or its total corporate assets.

We therefore submit that there was no error committed by the Supreme Judicial Court in ruling that the appellant was engaged in Massachusetts in a business other than interstate, that the excise was assessed and collected upon property located within the taxing jurisdiction, that the tax imposed did not place a direct burden upon interstate commerce or place an indirect burden of such a kind or character as to obstruct or interfere with such commerce and that its corporate assets outside of Massachusetts

were merely utilized for the purpose of furnishing a measurement for the tax and not in order to assess a tax thereon, and, consequently, no property of the appellant beyond the jurisdiction of Massachusetts was reached by taxation, and the appellant was not deprived of his property without due process of law.

We further respectfully submit that no errors of law were committed by the Supreme Judicial Court of Massachusetts in affirming the order of the Board of Tax Appeals granting to the appellant an abatement in the amount of $1508.36.

Respectfully submitted,

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Attorney General for the Commonwealth of Massachusetts,

JAMES J. RONAN,
Assistant Attorney General.

Appendix.

General Laws of Massachusetts, Tercentenary Edition, Chapter 63, Sections 30, 39 to 43, inclusive.

Section 30. When used in this section and sections thirty-one to fifty-two, inclusive, the following terms shall have the following meanings:

1. "Domestic business corporations", every corporation organized under or subject to chapter one hundred and fifty-six, except corporations organized under the provisions of section ten of chapter one hundred and fifty-seven, and except domestic manufacturing corporations as defined in section thirty-eight C.

2. "Foreign corporations", every corporation, association or organization established, organized or chartered under laws other than those of the commonwealth, for purposes for which domestic corporations may be organized under chapter one hundred and fifty-six, which has a usual place of business in this commonwealth, or is engaged here, permanently or temporarily, in the construction, erection, alteration or repair of a building, bridge, railroad, railway or structure of any kind; provided, that said term shall not apply to such corporations, associations or organizations without capital stock as are subject to taxation under section eighteen of chapter one hundred and fifty-seven, or to foreign manufacturing corporations as defined in section forty-two B.

3. "Corporate excess", in the case of a domestic business corporation, except as hereinafter provided, the fair value of its capital stock on the last day of the taxable year as defined in paragraph numbered six of this section, less the value of the following on such date:

(*a*) The works, structures, real estate, motor vehicles, machinery, poles, underground conduits, wires and pipes owned by it within the commonwealth subject to local taxation, except such part of said real estate as represents the

interest of a mortgagee. The term "real estate", as used in this subdivision and in subdivision (*a*) of paragraph four of this section shall include the corporation's interest as lessee in such buildings on land held under a lease as by the terms of the lease are the property of and may be removed by the lessee, and such buildings, for the purposes of said subdivisions and of sections fifty-five and sixty-eight A, shall not be deemed real estate of the lessor.

(*b*) Securities, the income of which, if any, if received by a natural person resident in this commonwealth, would not be liable to taxation, except shares in national banks and voluntary associations, trusts and partnerships.

(*c*) Its real estate, machinery, merchandise and other tangible property situated in another state or country, except such part thereof as represents the interest of a mortgagee.

(*d*) If any portion of its cash and accounts and bills receivable, excluding notes, is attributable to an office outside the commonwealth, the same proportion of its cash and accounts and bills receivable, excluding notes, which its real estate, machinery and merchandise situated in another state or country bear to its total real estate, machinery and merchandise, to the extent that such proportion fairly represents, in the judgment of the commissioner, the amount which is properly allocable to such other state or country.

If by reason of recent organization, or otherwise, the corporation is not required to make to the commissioner a return of net income for a taxable year, the value of the corporate excess shall be determined as of the first day of April when the return called for by section thirty-five is due.

4. "Corporate excess employed within the commonwealth" by a foreign corporation, except as hereinafter provided, such proportion of the fair value of its capital

stock on the last day of the taxable year as defined in paragraph numbered six of this section, as the value of the assets, both real and personal, employed in any business within the commonwealth on that date, bears to the value of the total assets of the corporation on said date, less the value of the following on such date:

(*a*) Works, structures, real estate, motor vehicles, machinery, poles, underground conduits, wires and pipes owned by it within the commonwealth subject to local taxation, except such part of said real estate as represents the interest of a mortgagee.

(*b*) Securities held in the commonwealth, the income of which, if any, if received by a natural person resident therein, would not be liable to taxation, except shares in national banks, voluntary associations, trusts and partnerships. In determining the proportion of assets employed within the commonwealth, the commissioner may include such bank deposits in other states as are employed principally in the conduct of the business in the commonwealth.

If by reason of recent organization, or otherwise, the corporation is not required to make to the commissioner a return of net income for a taxable year, the value of the corporate excess employed in this commonwealth shall be determined as of the first day of April when the annual return called for by section forty is due.

5. "Net income", except as otherwise provided in sections thirty-four and thirty-nine, the net income for the taxable year as required to be returned by the corporation to the federal government under the federal revenue act applicable for the period, adding thereto any net losses, as defined in said federal revenue act, that have been deducted and all interest and dividends not so required to be returned as net income which would be taxable if received by an individual inhabitant of the commonwealth; provided that net income as defined in this paragraph shall not

include interest from bonds, notes or certificates of indebtedness of the United States or of any federal instrumentality, if such interest is by the constitution of the United States or by act of congress exempt from taxation under this chapter.

6. "Taxable year", the fiscal or calendar year for which the corporation was required to make its last return to the federal government due prior to April first of the year in which the tax is to be assessed, or, if such return was for a fractional period, a full year, including and ending with such fractional period.

* * * * * * * * *

SECTION 39. Except as otherwise provided herein, every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the commonwealth, an excise equal to the sum of the following, provided that every such corporation shall pay annually a total excise not less in amount than one twentieth of one per cent of such proportion of the fair value of its capital stock as the assets, both real and personal, employed in any business within the commonwealth on the day fixed for determination of the value of the corporate excess employed within the commonwealth bear to the total assets of the corporation employed in business on said date:

(1) An amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth.

(2) An amount equal to two and one half per cent of its net income determined to be taxable in accordance with the provisions of this chapter.

If two or more foreign corporations doing business in this commonwealth participated in the filing of a consolidated return of income to the federal government, the tax under paragraph (2) above may, at their option, be assessed upon their combined net income, in which case the

tax shall be assessed to all said corporations and collected from any one or more of them. Foreign corporations thus affiliated and doing business in this commonwealth, which do not elect, under the foregoing provision, to be assessed upon their combined net income, and all other foreign corporations doing business in this commonwealth, which have filed with one or more corporations not subject to this section a consolidated return of net income to the federal government, shall each file with the commissioner, as a part of the return required by this chapter, a statement of net income in such form as he may prescribe, showing the gross income and deductions in accordance with the law and regulations governing the usual federal returns of corporations not thus affiliated; and the net income thus shown, after making deductions therefrom and additions thereto as provided in paragraph five of section thirty, shall be the "net income" under this chapter.

SECTION 39A. The provisions of section thirty-three imposing a minimum tax upon domestic business corporations in certain cases shall, in like cases, apply to foreign corporations with respect to the carrying on or doing of business by them in the commonwealth.

SECTION 39B. [INSERTED, 1923, 254, § 2; REPEALED, 1924, 26, § 1.]

SECTION 39C. Every foreign corporation deriving its profits principally from the ownership, sale, rental or use of real estate or tangible personal property shall pay annually, with respect to the carrying on or doing of business by it, a total excise under this chapter not less in amount than one twentieth of one per cent of said corporation's gross receipts from business assignable to this commonwealth as defined in clause six of section thirty-eight.

SECTION 40. Every foreign corporation shall make returns as provided in sections thirty-five and thirty-six; and all provisions of said sections shall apply to such corporations,

except that the term "corporate excess" in said section thirty-five shall, in the case of a foreign corporation, mean the corporate excess employed by it within the commonwealth.

SECTION 41. The commissioner shall, except as otherwise provided in section forty-two, determine in the manner provided in this section the part of the net income of a foreign corporation derived from business carried on within the commonwealth.

The following classes of income shall be allocated as follows:—

(*a*) Gains realized from the sale of capital assets, if such assets consist of real estate or tangible personal property situated in the commonwealth, shall be allocated to this commonwealth.

(*b*) Interest received from any corporation organized under the laws of the commonwealth, or from any association, partnership or trust having transferable shares and having its principal place of business in the commonwealth, or from any inhabitant of the commonwealth, except interest received on deposits in trust companies or in national banks doing business in the commonwealth, shall be allocated to this commonwealth.

(*c*) Gains realized from the sale of capital assets other than those named in paragraph (*a*) above shall not be allocated in any part to this commonwealth.

(*d*) Interest other than that described in paragraph (*b*) above and dividends shall not be allocated in any part to this commonwealth.

Income of the foregoing classes having thus been allocated, the remainder of the net income as defined in section thirty shall be allocated as follows:—

If a foreign corporation carries on no business outside this commonwealth, the whole of said remainder shall be allocated to this commonwealth.

If a foreign corporation carries on any business outside this commonwealth, the remainder of the net income shall be allocated as provided in paragraphs 2 to 9, inclusive, of section thirty-eight.

SECTION 42. A foreign corporation carrying on part of its business outside the commonwealth may, by notification to the commissioner on or before the time when its return under this chapter is due to be filed, refuse to accept the allocating method set forth in the preceding section. A foreign corporation, which so refuses, and every such corporation, which is foreign to the United States and which is required to return to the federal government only income from sources within the United States, shall, on or before May tenth, file with the commissioner, under oath of its treasurer, a statement in such detail as the commissioner shall require, showing the amount of its annual net income derived from business carried on within the commonwealth, and such further information as the commissioner may require with reference thereto, and the commissioner shall determine the amount of the net income received from business carried on within the commonwealth. The amount thus determined, after making the deduction provided for by section forty-two A, shall be the net income taxable under this chapter and the foregoing determination shall be in lieu of the determination required by the preceding section.

SECTION 42A. The net income of a foreign corporation allocated to this commonwealth shall be its net income subject to tax under this chapter.

SECTION 42B. Every corporation, association or organization established, organized or chartered under laws other than those of the commonwealth, which has a usual place of business in the commonwealth and is engaged in manufacturing therein, shall, for the purposes of this chapter, be deemed a foreign manufacturing corporation. Every foreign

manufacturing corporation shall be taxed in the same manner and shall have the same duties under this chapter as other foreign corporations, except that from the net income of a foreign manufacturing corporation, allocated to this commonwealth, there shall be deducted the same proportion thereof which the fair cash value of machinery owned by the corporation and used in manufacturing in the commonwealth bears to the value of its total assets employed in the commonwealth, and the amount remaining shall be its net income subject to tax under this chapter. All provisions of this chapter relative to the assessment, collection, payment, abatement, verification and administration of taxes, including penalties, applicable to other foreign corporations shall, so far as pertinent, be applicable to taxes upon foreign manufacturing corporations.

SECTION 43. After determining the amount of tax due from any foreign corporation under paragraph (2) of section thirty-nine, the commissioner shall then credit the corporation with a sum equal to five per cent of the dividends paid by it, during the previous calendar year, to inhabitants of this commonwealth, and the amount then remaining due shall be the amount of tax to be levied upon the corporation under said paragraph; provided, that if more than one half of the capital stock of any such corporation is owned by another foreign corporation not subject to taxation under sections thirty to fifty-one, inclusive, but has stockholders who are inhabitants of this commonwealth and are subject to taxation upon their income under section one of chapter sixty-two, such corporation, upon filing with the commissioner such information as he shall deem necessary for the purpose, shall be credited with a sum equal to five per cent of such a proportion of its total dividends as will prevent double taxation of the income of the corporation and of the dividends of such other foreign corporation actually taxed to inhabitants of this commonwealth.

SUPREME COURT OF THE UNITED STATES.

No. 715.—October Term, 1935.

The Atlantic Lumber Company, Appellant, *vs.* Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts.	Appeal from the Supreme Judicial Court of the Commonwealth of Massachusetts.

[May 25, 1936.]

Mr. Justice Sutherland delivered the opinion of the Court.

A Massachusetts statute (Gen. Laws, Ter. ed., c. 63, §§ 39-43) imposes upon a foreign corporation, with respect to the carrying on or doing of business by it within the commonwealth, an excise in a sum to be ascertained as the statute provides. So far as the present case is concerned, the amount of the excise is a specified percentage of the value of the corporate excess employed by the corporation within the commonwealth. Such corporate excess (§30, par. 4) means, in the case of a foreign corporation, such proportion of the fair value of its capital stock as the value of the assets employed in the commonwealth bears to the value of its total assets, less certain deductions. Under this statute appellant's tax was fixed at approximately $1,500. We find nothing in the record to justify the conclusion that the amount of the tax was not fairly arrived at under the provisions of the statute as construed by the court below, or that it was so allocated as to result in imposing a tax upon property outside the state; and the only question is whether the tax constitutes an unconstitutional burden upon interstate commerce. The court below, sustaining the action of the state board of tax appeals, held that the exaction was an excise for the privilege of having a place for the transaction of intrastate business in the state with the protection of state law and the appertaining advantages; and that the effect upon interstate commerce was at most incidental and remote. — Mass. —.

Appellant is a corporation engaged in the wholesale lumber business, and is organized under the laws of Delaware. Its principal office is in Massachusetts, where it also maintains a sales office. Its Massachusetts office is used as headquarters for salesmen, who solicit orders in Massachusetts and other states. In that office it car-

ries on correspondence and other business activities in connection with orders for and shipments of goods for the designated territory. Orders are accepted at the Massachusetts office, and are filled from the distributing yard of the company or the mill of a subsidiary outside the state. Remittances from its customers are made to the Massachusetts office. No stocks of lumber are kept in that state; and the only tangible property in the state is office furniture and equipment and salesmen's automobiles. Appellant has bank accounts in Boston, New York City, Buffalo, Brooklyn, and Toronto, Canada, the Boston account being the most active. The corporate books and records are kept in Massachusetts, where its treasurer is located, its directors' meetings are held, and dividends are declared. Dividends, so far as declared, have been paid out of the Boston account.

Appellant owns practically all the stock of three subsidiaries. Two of them are engaged in cutting timber and manufacturing lumber—one in Tennessee, Arkansas, and Louisiana, and the other in South Carolina. The third subsidiary simply holds title to timber lands in Louisiana.

If appellant did nothing but transact interstate business, the tax would constitute a burden upon that commerce, and could not stand under the commerce clause of the Constitution. *Alpha Cement Co.* v. *Massachusetts*, 268 U. S. 203; *Cheney Brothers Co.* v. *Massachusetts*, 246 U. S. 147, 153; *Ozark Pipe Line Co.* v. *Monier*, 266 U. S. 555, 562 *et seq.*

But such is not the case. Although organized in Delaware, so far as the record shows appellant does not function there but in Massachusetts, to which state the exercise of its corporate powers was transferred and is confined. In the *Champion Copper Company* case, decided by this court in *Cheney Brothers Co.* v. *Massachusetts*, *supra*, p. 155, a Michigan corporation maintained an office in Boston, pursuant to a provision in its articles of association. The proceeds of its business in Michigan were deposited in Boston banks, which, after paying salaries and expenses, were distributed as dividends from the Boston office. Directors' meetings were held frequently during each year at the Boston office, at which meetings reports from the treasurer and general manager were received, dividends were voted, officers were elected, and other corporate duties were discharged. This court held—"These corporate activities in Massachusetts are not interstate commerce and may be made the basis of an excise tax by that State."

The same decision involved a similar tax imposed upon another Michigan corporation, the Copper Range Company. That company also maintained an office in Boston. It was, like the appellant here, a holding company. In Massachusetts it held stockholders' and directors' meetings, kept corporate records and books of account, received dividends from its stock holdings, deposited the money in Boston banks, and paid the same out, after deducting salaries and expenses, in dividends to its stockholders. We held—"The exaction of a tax for the exercise of such corporate faculties is within the power of the State. Interstate commerce is not affected."

The decision in respect of those companies covers the present case; and since that decision has never been overruled or qualified, it would be unnecessary to go further, except for *Ozark Pipe Line* v. *Monier, supra,* upon which appellant confidently leans. The situation there, however, was quite different from that presented in the present case or in the cases of the two Michigan corporations just mentioned—a difference plainly recognized by the opinion in the *Ozark* case. There, a Maryland corporation owned and operated a pipe line extending from Oklahoma through Missouri to Illinois, by which crude petroleum was carried from Oklahoma to Illinois. No oil was received or delivered in Missouri. The license issued by the state was to engage "exclusively in the business of transporting crude petroleum by pipe line." The company, it is true, maintained its principal office in Missouri and there kept its books and bank accounts, paid its employees, purchased supplies, employed labor, maintained telephone and telegraph lines, and carried on various other activities; but all were linked exclusively to the pipe line and operated only to further the flow of oil in interstate commerce. Neither property nor activities were anything more than aids to the operation of the pipe line; and together with that line they combined to constitute in practical effect an instrumentality of that commerce. Thus, the burden of the tax which the State imposed fell upon interstate transportation immediately and directly, while here the effect upon interstate commerce, so far as there is any, is remote and incidental—a distinction which, in respect of such legislation as we are now considering, marks the line between a tax which is valid and one which is not.

Judgment affirmed.